THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Hon. Alex Kinlaw, Jr., Circuit Court Judge

2023-000025

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

versus

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

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This appeal involves the rezoning by the Respondent City of Greenville ("City') of property in the Pendleton and Academy Streets area in Greenville known as the Pendleton Street Corridor and Academy Street Corridor. The Appellants are the owners of property at 907 Pendleton Street within the Pendleton Street Corridor. Appellants rent the property to third parties who operate OJ's, a popular drive-in restaurant, there. The restaurant has a drive-thru window which is in use and has been since 1993. Testimony of Constantino Hassiotis, R. p. 192, line 21-23.

In 2018, the City began the process of rezoning approximately 103 acres along a portion of Pendleton Street, North Memminger Street, South Calhoun Street, and South Academy Street. As part of the process, an Application for Rezoning was prepared by Staff of the City's Planning Commission. Defendant's Exhibit 20, R. pp. 440-464. The application set forth the purposes of the rezoning proposal and explained why rezoning much of the area to Redevelopment District (RDV) was recommended. Here is a portion of the Staff's reasoning from the application:

> Staff concludes that the proposed zoning designation of RDV is Mixed-Use- Community (Pendleton Street) and Urban Residence (Academy Street) Future Land Use designations. The Mixed-Use Community designation encourages grocery stores, specialty stores, community libraries, medical offices, mid-size employers and community parks. Residential uses are also encouraged. The Urban Residential designation encourages a range of housing, including single-family, detached houses, attached homes and multi—family units. This designation serves as a transition between downtown core uses and the single-family neighborhood of outlying areas. The focus of both designations is on pedestrians.

Defendant's Exhibit 20, R. p. 445.

The application explained why the proposed amendment to RDV would be beneficial to the community:

> The RDV designation will guide redevelopment and increase the viability of the area by limiting certain uses and encouraging pedestrian-orientation, mixed-use pattern of retail, office and residential development. The proposed re-zoning will require a high quality of development, including buffering, that is sensitive to the nearby single family, and multi-family residential districts.

R. p. 445.

The Staff described the expected impact on property values as follows:

> It is not apparent that the proposed amendment will result in significantly adverse impacts on the property values of surrounding lands. On the contrary, it is anticipated that the proposed amendment will have a positive impact on property values and provide property owners with assurance that there is consistency in the manner in which Pendleton and Academy Streets will be redeveloped.

R. p. 446.

907 Pendleton Street was within the area recommended to be rezoned to RDV. The application contained a table entitled "Comparison of Uses In Zoning Districts" that illustrated how the changes to RDV would impact properties in the area. Defendant's Exhibit 20, R. p. 449. The restaurant on Appellants' property was a restaurant with a drive-thru window. This use was permitted for properties zoned C-3 and allowed as a conditional use property under the RDV designation. Many other potential uses are available to a property zoned RDV as illustrated by the comparison sheet.

The rezoning process was finalized in February 2019 when City Council passed the ordinance. The Council's justification for the rezoning is set forth in the Ordinance. Defendant's Exhibit 4, R. pp. 387-388.

Appellants opposed the rezoning effort. Prior to the rezoning, Appellants' property was zoned C-3. As a result of the rezoning, most of the properties within the rezoning area on Pendleton Street, including Appellants' property, were downzoned from C-3 to RDV. Defendant's Exhibit 5, Existing Zoning, R. p. 396; and Pendleton Street Proposed Zoning, p. 399.

Appellants were concerned that in the future, should their property lose its grandfather status, the owner of the property might not be able to have a drive-thru window. Appellants also took issue with the City's recommendation for property across Pendleton Street and its anticipated commercial use. At the City Council hearing on January 28, 2019, when the proposed ordinance was given first reading, Appellants' representative communicated these concerns to City Council. Defendant's Exhibit 1, R. p. 376.

Appellants' concerns about the drive-thru window:

The rezoning of Appellants' property to RDV made the restaurant with drive-thru window a nonconforming use. However, a nonconforming use would be allowed to continue in perpetuity unless the business located on the property ceased to operate for six months or more, or if the existing use was significantly expanded. Defendant's Exhibit 4, R. p. 388; Defendant's Exhibit 1, p. 376.

The City's process for obtaining approval of a drive-thru window in the future, if the property should lose its grandfather status, was described generally at trial during Appellants' case by Virginia Stroud of the City. Ms. Stroud was not shown and was not asked by Appellants' trial counsel to testify about the City's Land Management Ordinance. While she could not guarantee that a conditional use permit for a drive-thru window would be approved by the Board of Zoning Appeals, Ms. Stroud testified that during her time with the City she was not aware of a petition ever being denied. R. pp. 161-163. Ms. Stroud testified that as long as the future applicant fulfilled

the conditions for approval, primarily dealing with lighting and sound requirements that protected the surrounding neighborhood, Ms. Stroud's expectation was that a petition for conditional use as to a drive-thru window would be approved. She testified that the potential impact of an RDV property designation on an owner's ability to have a drive-thru window is "really none at all". R. p. 184.

Appellant Constantinon Hassiotis acknowledged that Appellants had no evidence that the City would not approve a conditional use petition if the property ever lost its grandfather status. Testimony of Constantinon Hassiotis, R. pp. 225-226. He testified that Appellants have established a buffer of brush and ground trees to protect neighboring properties from light and sound from the drive-thru window. R. pp. 226-228.

Appellants' concerns about the Enigma Property:

Appellants were upset that the "Enigma Property", which is situated within the rezoned area at the northeast corner of the intersection of Pendleton and Academy Streets, had been left as C-3 property. The first version of the rezoning plan had changed the Enigma Property to RDV.

On August 8, 2018, Planning Staff submitted the application for rezoning to the Planning Commission. On August 16, 2018, the Planning Commission considered the application and tabled it after discussion. Defendant's Exhibit 11—August 16, 2018 Planning Commission Minutes, R. pp. 428-429. The Commission tabled the proposal and asked that a workshop be held to further study the proposed request.

The workshop was held on September 27, 2018. Defendant's Exhibits 13 and 14—Planning Commission Workshop Agenda and Minutes, R. pp. 431-432. The Planning Commission requested that Staff review the rezoning request with the Downtown Master Plan Consultants Urban Design Associates. The consultants agreed with the proposed rezoning, including the RDV

concept. Defendant's Exhibit 20, R. pp. 440-464; testimony of Virginia Stroud, R. p. 181, lines 2-16.

On December 20, 2018, the Planning Commission considered the revised rezoning plan. In advance of the meeting, Planning Staff issued a Planning Staff Report on December 14. Defendant's Exhibit 20, R. pp. 440-464. Staff reported that leaving the Enigma parcels as C-3 was appropriate for two reasons. "First, South Academy Street is an arterial road, carrying large volumes of traffic (between 20,200 – 27,300 cars per day.). Second, Staff believes the C-3 zoning is consistent with the other three corners located at the intersection of South Academy Street and Pendleton Street."

During the hearing, public comments were heard in favor of and against the revised application. A motion to recommend the rezoning plan to City Council was passed by the Planning Commission during this meeting. Defendant's Exhibit 22, R. pp. 460-465.

The first reading of the proposed ordinance by City Council took place at its meeting of January 28, 2019. Defendant's Exhibit 1, R. pp. 374-377.

The Council heard from a variety of speakers both for and against the proposed ordinance. A representative for Appellants spoke and expressed to City Counsel the Appellants' opposition to the rezoning plan.

A request was made by Rivers Stillwell, a representative of the Stone Family Trust, which owned property on Academy Street within the zoning area. R. p. 377. The Stone property was currently zoned C-2, Local Commercial District. The proposed rezoning would have down-zoned the property to RM-3, single- and multi-family residential. Mr. Stillwell asked Council to change the proposed downzoning for the Stone Family Trust property to RDV, arguing that this would

maintain the status quo on the property. The RDV designation is less intense than the property's then-existing C-2 status. The minutes of the meeting provide, "Councilmember Brasington requested if it is permissible for Staff to review and amend the Ordinance at second reading, and Council members responded affirmatively". R. p. 377.

The second and final reading of the proposed ordinance was at City Council's meeting on February 11, 2019. City Council adopted the plan on that date. Defendant's Exhibit 3, R. p. 384. The reasons the City chose to rezone the area and the process that was followed are delineated in the Ordinance and accompanying exhibits. Defendant's Exhibit 4, R. pp. 386-398. The minutes of the meeting show that "Councilmember Brasington asked if the Ordinance includes an adjustment to the RDV (Redevelopment District) mentioned at the January 28 formal meeting, and Mr. Graham responded that it includes the adjustment requested by Rivers Stillwell." Defendant's Exhibit 3, R. p. 384.

Appellants file suit against the City:

Appellants commenced this action by the filing of a Summons and Complaint on April 12, 2019. Appellants filed an Amended Summons and Complaint on June 27, 2019. The City timely answered the Complaint denying the pertinent allegations and asserting affirmative defenses.

The gravamina of the Appellants' complaints were first, that the ordinance violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and second, that the ordinance violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Amended Complaint, R. pp. 38-39, paragraphs 37-39.

A trial was held in this matter August 29 and 30, 2022. The Honorable Alex Kinlaw, Jr. presided. At the outset of the trial, counsel for the City moved that the trial be bifurcated. Counsel

asserted that the constitutionality of the ordinance was an issue for the trial judge, and that if the trial judge found that the ordinance violated Appellants' due process and/or equal protection rights, the jury should determine the amount, if any, of damages to be awarded. Trial counsel for Appellants agreed that the due process issues and the interpretation of the ordinance were for the trial judge. However, Appellants' counsel argued that the equal protection cause of action required factual findings which should be decided by the jury and not the trial judge. R. pp. 61-73. The trial judge granted the City's motion to bifurcate. A jury was sworn and then excused pending the determination by the trial judge whether Appellants would meet their burden of proof that the ordinance violated their due Process and equal protection rights.

Appellants called three witnesses at trial to support their claims against the City and introduced several exhibits. Appellants' first witness was Jason Tankersley, a commercial developer who had served on the City's Planning Commission for approximately seven years. R. pp. 102-103. Mr. Tankersley served as the Chairman of the Planning Commission at the time when the rezoning plan was considered. R. p. 103, lines 2-4. On direct examination, Mr. Tankersley acknowledged that he had not voted to approve the rezoning plan because of his personal concerns about the size of the project. R. p. 111, lines 9-24. He also acknowledged that he had voiced his personal concern that there may have been some "cherry-picking" for various zoning designations. R. p. 116, lines 24-25; p. 117, lines 1-10. However, Mr. Tankersley defended the decision by City Council to approve the rezoning ordinance and explained that notwithstanding his personal opinion, the process that was followed and the decision by City Council to approve the ordinance were appropriate. R. p. 118, lines 20-25; p. 119, lines 1-7; p. 127, lines 14-20; p. 129, lines 5-21. Mr. Tankersley testified that the major impetus for the rezoning plan came from the neighborhood

itself and that the proposed rezoning would be consistent with the neighborhood's view that it would benefit from the rezoning change. R. p. 123, lines 1-19.

Mr. Tankersley testified that the Staff's recommendation that the Enigma property remain C-3 under the rezoning, and the Staff's justification for treating that property the same as the other corner properties on the intersection, were reasonable. R. p. 133, lines 6-25; p. 139, lines 13-23. Mr. Tankersley answered several questions concerning the impact the ordinance had on the existing use of the Appellants' property. He testified that the tenant, OJ's Diner, was still operating full time a on the property, that it had a drive-thru window, and that as a restaurant with indoor seating, the current use that had been acceptable under C-3 zoning was also acceptable under the RDV designation. R. p. 140, lines 11-19; p. 141, lines 5-10. Mr. Tankersley confirmed that the zoning of the Enigma property was reasonable and appropriate. R. p. 143, lines 9-13. Mr. Tankersley testified that although he did not like the size of the area being rezoned, the rezoning established by the ordinance represented a commonsense compromise between the extremes of pure commercial and pure residential districts. R. p. 143, lines 21-25. Mr. Tankersley was asked whether the treatment of the Enigma property was spot zoning and he testified that it was not. R. p. 143, lines 4-8.

Virginia Stroud, Community Development Manager for the City of Greenville for over 19 years, was also called to testify on behalf of the Appellants. Ms. Stroud was asked why the Family Dollar store, which was separated by a parcel next to the Appellants' property and also fronting on Pendleton Street, was omitted from the rezoning study and allowed to remain C-3. R. p. 154, lines 23-25; p. 155, lines 1-9. Ms. Stroud testified that the Family Dollar store was appropriately zoned C-3 because of its proximity to Academy Street. Ms. Stroud explained that Sumner Street was a natural end to the study area and was a natural boundary. R. p. 154, line 23; p. 155, line 9.

Appellants' trial counsel questioned Ms. Stroud about why, during the rezoning process, changes were made to the proposed zoning plan at the request of several property owners, while Appellants' request that their property remain as C-3 was not allowed. Ms. Stroud explained that Appellants were concerned that under the rezoning plan the drive-thru restaurant was a conditional use as RDV. R. p. 161, lines 14-16. According to Ms. Stroud, Staff explained to Appellants that the drive-thru window would be allowed in RDV but would be a conditional use. Ms. Stroud testified that Staff explained to Appellants the conditions for the use were to protect the adjacent residential uses and were fairly easy to work through. R. p. 162, lines 3-14. Ms. Stroud acknowledged that there was no absolute guarantee in the future that a conditional use permit would be approved. However, she testified that in her experience she had never known anyone applying for a conditional use permit to be turned down. R. p. 163, lines 10-22.

Ms. Stroud testified that neither City Council members nor the Mayor tried to improperly influence Staff about the rezoning. R. p. 170, lines 2-6; p. 173, lines 10-19; p. 185, lines 10-21.

Regarding the Enigma property zoning designation, Ms. Stroud testified that the original proposal to change that property's designation to RDV was due to a Staff error. R. p. 175, line 23; p. 176, line 2. She confirmed that Staff was provided information that confirmed the Enigma property should have been zoned C-3 due to the amount of traffic on Academy Street and because the property was a corner property. R. p. 179, line 17; p. 180, line 8.

Ms. Stroud testified that the purpose of the rezoning plan was to help the neighborhood transition into a combination of residential and small business uses to create a community environment. R. p. 179, lines 7-13.

Ms. Stroud confirmed that during the application process, the Planning Commission asked Staff to meet with Urban Design Associates, the City's consultants for the overall community plan. The consultants were in favor of the RDV designation along the Pendleton Street Corridor. R. p. 181, lines 5-13.

Ms. Stroud was asked about the Stone Family Trust owner's request that its property be downzoned to RDV rather than to RM-2. Stroud testified that the suggestion made on behalf of the Stone Family Trust was consistent with good planning principles. She confirmed that the request to RDV was the same zoning designation sought for the Pendleton Street Corridor where Appellants' property was situated. R. p. 182, line 16; p. 183, line 21.

Ms. Stroud confirmed that a restaurant with indoor seating like OJ's Diner was acceptable if the property ever reverted to RDV. The practical impact of RDV on the owner's ability to have a drive-thru window was "really none at all". R. p. 184, lines 2-16.

Ms. Stroud testified that the zoning plan was a good one. R. p. 185, line 22-25. She was asked why a drive-thru window was a conditional use in RDV zoning. Ms. Stroud explained that it was "just a way of making sure that all businesses or all restaurant owners with drive-thru's are respectful of the neighbors that live nearby." R. p. 187, lines 13-24.

As their final witness, Appellants called Appellant Constantinon Hassiotis. Mr. Hassiotis testified that Appellants voiced their objections to the proposed rezoning at several of the public meetings held prior to the passage of the ordinance. He said that their objections were "that if we were to lose our tenants that we would have difficulty finding another tenant under RDV." R. p. 195, line 24; p. 196, line 6. Mr. Hassiotis admitted that after the rezoning, the property retained significant value. Over objection by the City, Mr. Hassiotis testified that if the property were

zoned C-3 it would be worth $1.5 million. R. p. 200, lines 5- 15. However, he acknowledged that after the rezoning they were offered $600,000 for the property. R. p. 199, lines 19-22. Regarding his valuation opinion, Mr. Hassiotis acknowledged that he had never testified as a witness about comparable sales or the value of property. R. p. 230, lines 1-4.

Mr. Hassiotis testified on cross-examination that the tax notice for the property for tax year 2019 was $280,740 and in 2021 the tax value had increased to $322,840. He acknowledged that the market value had increased during those years. R. p. 243, lines 2 – 15. Mr. Hassiotis testified that Appellants had no expert witness to testify as to the impact of the rezoning, if any, on the value of the property. R. p. 244, lines 15 – 19. Mr. Hassiotis also acknowledged that the tenant OJ's Diner provided economic benefit to the Appellants. R. p. 244, lines 20-25.

Over the City's objections, Mr. Hassiotis was permitted to testify that the City had targeted Appellants for unfair treatment arising from the City's purchase of other property from Appellants' father in the 1980's. He was permitted to testify that the City held a grudge against Appellants. The trial judge permitted the testimony on the basis that it was relevant to Appellants' equal protection claim. R. p. 223, lines 4-23.

During cross-examination, Mr. Hassiotis admitted that he had no direct evidence that the City would not approve a conditional use permit for the drive-thru window if the property ever lost its grandfather status. R. p. 225, line 22; p. 226, line 7. He admitted that the Appellants had no evidence other than their opinion that the RDV classification was illegal. R. p. 231, lines 2-6. Mr. Hassiotis was asked whether Appellants had any evidence other than his opinion that the City established the RDV classification for the entire rezoning area because they wanted to target Appellants. Hassiotis could only point to the fact that the City changed the zoning designation from C-3 to RDV for the property. R. p. 233, line 23; p. 234, line 7.

The City moves for Directed Verdict and for Judgment:

Following the testimony of Mr. Hassiotis, Appellants rested. The City moved for a directed verdict, arguing that Appellants failed as a matter of law to meet their burden of proof to show that the ordinance violated due process and equal protection clauses of the United States Constitution. The trial judge denied the City's motion. R. pp. 247 – 275.

The City called Corbin Haskell, an expert real estate appraiser, who testified that there was no appreciable impact on the value of Appellants' property resulting from the zoning change to RDV. R. p. 279, lines 1-5; p. 280, lines 7-12, 17-20. Mr. Haskell also testified that a building which had been constructed on the Enigma property would have been allowed under either C-3 or RDV. R. p. 281, line 21; p. 282, line 8.

Following the testimony by Mr. Haskell, the City rested and renewed its motion for directed verdict on the basis of all the evidence that had been presented. The trial judge denied the motion. R. p. 292, lines 3 – 13.

Counsel for the City then moved that as a matter of law Appellants had failed to meet their burden of proof that the ordinance was so defective as to violate the due process and equal protection rights of Appellants. After hearing the arguments of counsel, the trial judge ruled from the bench that the Appellants had not met their burden of proof and as a matter of law had failed to establish that the enactment and enforcement of the ordinance were unconstitutional. R. pp. 305 – 320. On September 14, 2022, the trial judge issued an order of judgment in favor of the City. Appellants filed a Notice of Motion and Motion for New Trial or to Alter Amend Judgment. On December 26, 2022, the trial judge issued an order denying Appellant's motion. The Appellants filed their appeal on January 4, 2023.

ARGUMENT

I. THE TRIAL COURT CORRECTLY FOUND THAT THE APPELLANTS WERE NOT ENTITLED TO A JURY TRIAL ON THE ISSUE OF WHETHER THE CITY'S REZONING ORDINANCE VIOLATED THE APPELLANTS' EQUAL PROTECTION RIGHTS.

Appellants were not entitled to have a jury decide whether the ordinance violated their due process or equal protection rights. An issue regarding the interpretation of a legislative enactment is a question of law. McMaster v. Columbia Board of Zoning Appeals, 395 S.C. 499, 719 S.E.2d 660 (2011). In their Amended Complaint, Appellants attacked the ordinance. R. pp. 38-39, paragraphs 37-39. There was no evidence presented at trial that City officials utilized the ordinance *after* it was passed in an unconstitutional or otherwise unlawful way against Appellants. Appellants' focus during the trial of the case was on the ordinance itself and whether its RDV designation of Appellants' property violated Appellants' constitutional rights to due process and equal protection. Because the issue was whether the ordinance violated Appellants' constitutional rights, the issue was for the Court and not for a jury.

Much of the Appellants' arguments concern the process undertaken by City Planning Staff to prepare a proposal for the rezoning of the Pendleton Street and Academy Street Corridors. Appellants' arguments miss a crucial point. Neither the Planning Staff nor the Planning Commission passed the ordinance into law. Planning Commission member Jason Tankersley testified that "City Council is the only body that can rezone property…We just make a recommendation…." R. p. 119.

Appellants were not entitled to a jury trial on the issue of whether the zoning ordinance denied them equal protection. Appellants rely on City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999) to argue that the trial

court erred in determining whether the rezoning ordinance violated Appellants' constitutional right to equal protection. This reliance is misplaced, as City of Monterey supports the City's position that the issue of whether the rezoning ordinance denied Appellants' right to equal protection was for the court, not the jury. As Appellants point out in their brief, the issue before the Court in City of Monterey was whether the denial of a developer's proposals to develop property was a violation of the Due Process and Equal Protection provisions of the Fourteenth Amendment. Appellants' Brief at p. 17. The constitutionality of the zoning ordinance was not an issue. City of Monterey, 119 S.Ct. at 1624. The Supreme Court did not hold that a property owner has a right to a jury trial on the issue of the constitutionality of the law on which allegedly unconstitutional acts were committed. The Court said, "Del Monte Dunes did not bring a broad challenge to the constitutionality of the city's general land-use ordinances or policies, and our holding does not extend to a challenge of that sort…Del Monte Dunes' argument, in short, was not that the city had followed its zoning ordinances and policies but rather that it had not done so…." Id. at 1644; 1645. In his concurring opinion, Justice Scalia commented that "…in cases asserting municipal liability for harm caused by unconstitutional policies, judges determine whether the alleged policies were unconstitutional, while juries find whether the policies in fact existed and whether they harmed." Id. at 1649. City of Monterey confirms that the trial court in this case correctly decided that whether the City's rezoning ordinance met the constitutional challenge made by Appellants was and issue of law for the court to determine. The issues before the trial court involved the constitutionality of the City's rezoning ordinance, not decisions or actions made by Staff in enforcing the ordinance.

Appellants' reliance on Campbell v. Galloway, 483 F.3d 258 (4th Cir. 2007), Volk v. Coler, 845 F.2d 1422 (7th Cir. 1988), and Yatvin v. Madison Metropolitan School Dist., 840 F.2d 412 (7th

Cir. 1988) is also misplaced. Campbell involved a police officer's gender-based discrimination and retaliation claims against various defendants, not the constitutionality of an ordinance. Volk concerned a Title VII claim, not the constitutionality of an ordinance. Yatvin was in pertinent part about a Title VII claim based on alleged violations of a school district's affirmative action plan. The constitutionality of the plan was not an issue in the case. These cases are not inconsistent with the relevant holdings of City of Monterey.

Appellants' position that the equal protection claim was for the jury also runs afoul of South Carolina decisions which hold that the issue of interpretation of a legislative enactment is a question of law. See, e.g., McMaster v. Columbia Bd. of Zoning Appeals, 395 S.C. 499, 719 S.E.2d 660 (Ct. App. 2011).

The trial court correctly determined that the issue of whether the City violated Appellants' equal protection rights was for the court and not the jury.

II. THE TRIAL COURT CORRECTLY FOUND THAT THE APPELLANTS FAILED TO MEET THE BURDEN OF PROOF FOR ESTABLISHING THAT THE REZONING ORDINANCE VIOLATED THE APPELLANTS' DUE PROCESS AND EQUAL PROTECTION RIGHTS.

Appellants had to meet a high burden of proof to establish that the City's rezoning ordinance violated Appellants' due process or equal protection rights under the United States Constitution. The relevant points of law relative to the burden of proof as to both the due process and equal protection claims are summarized below.

The authority of the City to enact zoning ordinances that restrict the use of privately owned property is founded in the municipality's police power. Harbit v. City of Charleston, 382 S.C. 383, 674 S.E.2d 776 (Ct. App. 2009).

The burden of establishing the invalidity of a zoning ordinance is on the party attacking it to establish by clear and convincing evidence that the acts of the City Council were arbitrary, unreasonable, and unjust. Ani Creation, Inc. v. City of Myrtle Beach Board of Zoning Appeals, 440 S.C. 266, 890 S.E.2d 748 (2023).

The court cannot insinuate its judgment into a review of a city's rezoning decision but must leave that decision undisturbed if the propriety of the decision is even fairly debatable. Harbit v. City of Charleston, 382 S.C. 383, 674 S.E.2d 776 (Ct. App. 2009). It is not the court's function to pass upon the wisdom or expediency of municipal ordinances or regulations. Harbit, 674 S.E.2d 776; Ani Creation, Inc. v. City of Myrtle Beach Board of Zoning Appeals, 440 S.C. 266, 890 S.E.2d 748 (2023).

In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law. The State's deprivation of a property interest must fall so far beyond the outer boundaries of legitimate governmental authority that no process could remedy the deficiency. A legislative body does not deny substantive due process simply because it does not permit a landowner to make the most beneficial use of its property. Harbit v. City of Charleston, 382 S.C. 383, 674 S.E.2d 776 (Ct. App. 2009). 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. Dunes West Golf Club, LLC v. Town of Mount Pleasant, 401 S.C. 280,737 S.E.2d 601 (2013), McMaster v. Columbia Board of Zoning Appeals, 395 S.C. 499, 719 S.E.2d 660 (2011).

Every presumption will be made in favor of the constitutionality of a legislative enactment. A statute will be declared unconstitutional only when its invalidity appears so clearly as to leave

no room for reasonable doubt that it violates some provision of the Constitution. In order to successfully assault a city's zoning decision, a citizen must establish that the decision was arbitrary and unreasonable; and in the context of a zoning action involving property, it must be clear that the state's action has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense. Dunes West Golf Club, LLC v. Town of Mount Pleasant, 401 S.C. 280,737 S.E.2d 601 (2013).

Procedural due process is afforded when the property owner is given notice of the public hearing on the matter and is allowed to present his arguments at the planning commission and city council levels. Harbit v. City of Charleston, 382 S.C. 383, 674 S.E.2d 776 (Ct. App. 2009).

The rational basis standard, rather than strict scrutiny, applies to an equal protection challenge to a rezoning denial because the classification at issue does not affect a fundamental right and does not draw upon inherently suspect distinctions such as race, religion, or alienage. The Equal Protection Clause does not prohibit different treatment of people in different circumstances under the law; instead, the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. Harbit, 674 S.E.2d 776.

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 v. Town of Mount Pleasant, 401 S.C. 280,737 S.E.2d 601 (2013).

To succeed on an equal protection claim, the plaintiff must demonstrate that he has been treated differently from others with whom he is similarly situated, and that the unequal treatment was the result of intentional or purposeful discrimination. Morrison v. Garraghty, 239 F.3d 648, 654 (4th Cir. 2001).

Even assuming a governmental entity is not enforcing an ordinance equally, the fact that there is some unequal treatment does not necessarily rise to the level of an equal protection violation. Harbit v. City of Charleston, 382 S.C. 383, 674 S.E.2d 776 (Ct. App. 2009).

Under a rational basis review, the Equal Protection Clause is satisfied when: (1) there is a plausible policy reason for the classification; (2) the facts on which the classification is based rationally may have been considered to be true by the decision maker; and (3) the relationship of the classification to the goal is not so attenuated as to render the distinction arbitrary or irrational. A party bringing an equal protection challenge to a legislative enactment under rational basis review must negate every conceivable basis which might support the enactment and, therefore, has a steep hill to climb. Ani Creation, Inc. v. City of Myrtle Beach Board of Zoning Appeals, 440 S.C. 266, 890 S.E.2d 748 (2023).

To rebut a defendant's rational reasons for treating a plaintiff differently, the plaintiff carries the "heavy burden of negating every conceivable basis which might reasonably support the challenged classification." Van der Linde Housing, Inc. v. Rivanna Solid Waste Auth., 507 F.3d 290, 293 (4th Cir. 2007), cited by Lowe v. City of Charleston, 597 F.Supp.3d 855 (D.S.C. 2022).

Appellants' complaints made at trial and in their brief include the following: omitting the Family Dollar Store from the zoning area; and alleged favorable treatment given to Upstate Funeral Services; Michael Talley Law Firm; the Enigma Corporation; and the Stone Family Trust. The

evidence on which the trial court relied shows that the treatment of these properties by Planning Staff and City Council was reasonable, consistent with the purposes of the rezoning ordinance, and did not rise to the level of a constitutional deprivation of Appellants' due process or equal protection rights.

During the rezoning process, several neighborhood meetings were conducted by Staff to allow affected property owners to express their opinions about the proposed plan. Among those who attended and spoke were representatives of Upstate Funeral Services, Michael Talley Law Firm, David Stone for the Stone Family Trust, Enigma Corporation, and Appellant Constantinon Hassiotis. The comments of each, and the City's response at the meetings, were recorded as part of the rezoning application process. Defendant's Exhibit 7, R. pp. 403-404.

The Family Dollar Store property was not included within the proposed zoning area. Virginia Stroud testified that the property was more appropriately zoned C-3 because of its proximity to Academy Street, and because Sumner Street was a natural end to the study area and was a natural boundary. R. p. 154, lines 23-25; p. 155, lines 1-9. In Ani Creation, Inc. v. City of Myrtle Beach Board of Zoning Appeals, 440 S.C. 266, 890 S.E.2d 748 (2023), the Supreme Court, in a decision that affirmed the constitutionality of a municipal ordinance against complaints it violated the due process and equal protection rights of store operators, addressed the issue of whether the location of the boundaries of a re-zoning district violated the operators' equal protection rights. The Court held that the operators failed to show by clear and convincing evidence that the location of the boundaries of the district in that case was arbitrary or capricious. The Court commented that "Zones must have beginning and termination points", and that the disparate treatment of similarly situated businesses on either side of the boundary line survived rational basis review and was not a basis to find an equal protection violation. Likewise, here the

Appellants did not overcome Ms. Stroud's explanation for the area's boundaries and did not introduce clear and convincing evidence to demonstrate that exclusion of the Family Dollar Store property from the rezoning was without a rational basis or arbitrary and capricious.

The Appellants' complaints that Planning Staff made changes to the proposed rezoning plan at the request of Upstate Funeral Family Funeral Services and the Michael Talley Law Firm while denying the Appellants' request that their property not be changed to RDV do not rise to a constitutional deprivation of due process or equal protection rights. Ms. Stroud testified that the requests of the funeral home and law firm were consistent with the goals of the rezoning plan, while returning Appellants' property to C-3 (which would have made it the only property on its side of Pendleton Street not RDV under the plan) was not. Taking into consideration the basis for the rezoning set forth in the rezoning ordinance as well as the testimony of both Ms. Stroud and Mr. Tankersley, the City's reasoning for the RDV reclassification of Appellants' property was at a minimum "fairly debatable" and was a valid exercise of the City's right to rezone the Pendleton Street and Academy Street Corridors.

Appellants also contended that the City improperly left the Enigma Property as C-3. The evidence supporting the City's treatment of the Enigma Property as C-3 is much more than fairly debatable. The rezoning ordinance summarizes why the Enigma property was allowed to remain C-3 rather than RDV:

> [S]taff also reviewed the intersection of Academy Street and Pendleton Street and given that Academy Street is an arterial street and generates traffic counts of between 20,200 and 27,300 cars per day, and the three (3) adjoining corners are currently zoned C-3, staff recommended that this corner remain C-3….

Defendant's Exhibit 4, R. p. 388.

Jason Tankersley, called as a witness by Appellants, testified that the treatment of the Enigma Property as C-3 was reasonable. R. p. 129-133. This evidence by witnesses the Appellants called establishes a rational basis for leaving the Enigma Property as C-3. The City's treatment of the Enigma Property caused no harm to Appellants and was not a violation of their constitutional rights.

Appellants take issue with the City Council's treatment of the Stone Family Trust's property on Academy Street. In the final version of the zoning ordinance passed by City Council, the Trust property was zoned RDV. This had no effect on Appellants' property and was not a violation of Appellants' constitutional rights.

Prior to the re-zoning, the Trust's property was zoned C-2, Local Commercial. The Planning Commission had recommended that the property be downzoned to RM-2 (Single-Family and Multifamily Residential District), which was a less intense zoning district than C-2. David Stone, on behalf of the Trust, objected to the proposed downzone. Appellants argue that Stone threatened City planners in an email in which he argued that the Trust property should remain C-2. Plaintiff's Exhibit 5, R. p. 335. Appellants infer that the City was improperly persuaded by the "threats" to give the Trust what it asked for. Appellants overlook that the City did not leave the Trust property C-2 as Stone requested. Virginia Stroud testified that in response to Mr. Stone's concerns, Staff recommended RM-2 but also considered RDV for the property. Ms. Stroud testified that the suggestion made on behalf of the Trust was consistent with good planning principles. R. p. 182, line 16; p. 183, line 21.

The first reading of the proposed ordinance by City Council took place at its meeting of January 28, 2019. Defendant's Exhibit 1, R. pp. 374-377. During the meeting, Rivers Stillwell, representing the Trust, asked that the Trust property be downzoned to RDV, which is less intense

than C-2. Councilmember Brasington asked his colleagues if it were permissible for Staff to review and amend the ordinance to change the Trust property to RDV and Council members responded affirmatively. Defendant's Exhibit 1, R. p. 377. At the second and final reading of the proposed ordinance on February 11, 2019, the City Council adopted the rezoning ordinance, which included the Trust property's change to RDV. Defendant's Exhibit 3, R. p. 384.

This change had no effect on Appellants' property. The properties were not "similarly situated". The Stone Family Trust property was situated on what City Council described as the Academy Street Corridor, while Appellants' property was on the Pendleton Street Corridor. Defendant's Exhibit 4, R. p. 387. Changing the Trust property to RDV was consistent with the purposes of the overall rezoning plan, which included "[rezoning] those portions of the Academy Street commercial corridor from C-2 to RDV, RM-1…and RM-2…while maintaining and slightly expanding the residential designation where appropriate based on current uses…." Defendant's Exhibit 4, R. p. 387.

Appellants' contend at page 26 of their brief that Ms. Stroud testified at trial 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 the provisions of this Chapter". Actually Ms. Stroud said the opposite, that City Council was *not* required to send the plan back to Planning Commission: "No. The City Council has the final say." R. p. 174, lines 17-20. Appellant's trial counsel then read into the record a portion of the City's Land Management Ordinance: "if the City Council chooses to consider rezoning an area larger than requested or…[Counsel's stumbling over words omitted] a more intense zoning district, the matter shall be referred to the Planning Commission for public hearing and recommendation with provisions of this Chapter." R. pp. 174-

175. Trial counsel was quoting from Section 19-2.2 (E) (1) (h) (2) of the Municipal Code of Greenville, South Carolina. Appellants' trial counsel did not move to admit the code provision. The precise quote from that section is as follows: "If the city council chooses to consider rezoning an area larger than requested *or* a more intense zoning district, the matter shall be referred to the planning commission for public hearing and recommendation consistent with the provisions of this chapter." (Emphasis added.) The use of the word "or" is significant. See Brewer v. Brewer, 242 S.C. 9, 14, 129 S.E.2d 736, 738 (1963) (noting that the use of the word "or" in a statute "is a disjunctive particle that marks an alternative"… "The word 'or' used in a statute imports choice between two alternatives and as ordinarily used, means one or the other of two, but not both.")

Section 19-2.2 (E) (1) (h) (2) refers to two separate situations, separated by the word "or", where City Council chooses to consider rezoning different than that before them. The first would require a referral to the planning commission for public hearing and recommendation, but the second, where City Council chooses to consider a less intense zoning district, does not. The first situation would arise from an application. The second, which involved consideration of a less intense zoning district, does not arise from an application.

The rezoning of the Stone Family Trust property from C-2 to RDV was for a less intense zoning district, not more. City Council was not required to refer the downzoning of the Stone Family Trust property to Planning Commission.

City Council's actions in revising the Stone Family Trust zoning did not constitute a deprivation of Appellants' due process or equal protection rights. Assuming the Stone Family Trust property constitutes a "district", the rezoning of the property from C-2 to RDV made the property a less, not more, intense zoning district. The code section does not require the application process to begin anew with a referral of the proposed ordinance back to the Planning Commission.

Appellants have not met their burden to prove by clear and convincing evidence that Council's changing the proposed zoning for the Stone Family Trust property was an action so egregious as to require this Court to find that the ordinance deprived Appellants of their due process or equal protection rights. The Appellants have not established that the City intentionally discriminated against them by passing the ordinance. They produced no actual evidence that the City's motive to establish a RDV district in the rezoning ordinance was to hurt them. R. p. 233, line 23; p. 234, line 7.

The City's reasons for the ordinance and the rezoning of Appellants' property to RDV were set forth by the ordinance and the application and supporting materials submitted by the Planning Commission. Appellants were not treated differently in any meaningful way from the other property owners affected by the rezoning. The treatment of the properties of Upstate Funeral Services and Michael Talley Law Firm were reasonable, and unlike the Appellants' demands, were compatible with the purposes of the proposed ordinance. The basis for leaving the Enigma Property as C-3 was clearly established. The reasons the Family Dollar Store property was not included in the rezoning was explained and was within the discretion of the City. The Stone Family Trust owner tried but did not persuade the City to allow the Trust property to remain C-2. The City was agreeable to a compromise rezoning of RDV, which was permitted in the Academy Street Corridor plan and was consistent with the overarching purposes of the rezoning which was explained in the ordinance. The Appellants cannot credibly claim that they were treated differently from the Stone Family Trust by the ordinance when both properties were rezoned to RDV.

Appellants argue in their brief without evidence that the RDV zoning classification "allocates zoning responsibilities to City staff through 'conditional uses' without specific standards guiding their decisions…." Appellants' Brief, p. 21. Appellants initially made the allegation in

Paragraph 27 of their Amended Complaint: "The RDV zoning classification is invalid and arbitrary because it allocates zoning responsibilities to City staff without specific standards guiding their decisions. Ordinance violates the due process rights of Plaintiffs." The City denied this allegation in its Answer at paragraph 27, thereby putting the burden on Appellants to prove it.

Appellants introduced no evidence that the City did not provide specific standards to guide the allocation of zoning responsibilities by City staff. It was the Appellants' burden to demonstrate by evidence that the City had either no general land management ordinances or constitutionally inadequate ones for defining and determining how zoning classifications were defined. It was the Appellants' burden to demonstrate by evidence that there was no ordinance-based process to guide decision-making and appellate procedures for property owners not satisfied with administrative zoning-related decisions. The Appellants did not introduce such evidence.

It is clear the City has land management ordinances. In the eighth "Whereas" clause in Defendant's Exhibit 4 [R. p. 386], the ordinance states that the City "undertook an evaluation of the current zoning, and the commercial zoning designations permitted within the City's Land Management Ordinance." Appellants introduced into evidence Plaintiffs' Exhibit 9 [R. p. 341], a Planning Staff analysis of a proposed amendment to the Land Management Ordinance's Section 19-4.2 Table of Uses. Appellants introduced the Table of Uses at trial as Plaintiff's Exhibit 1 [R. p. 324]. The Appellants also introduced Plaintiff's Exhibit 11, Planning Commission minutes for December 20, 2018, and Plaintiff's Exhibit 3, the Planning Commission's application for the rezoning. These exhibits contain numerous references to Section 19 of the City Code. If the Appellants had introduced the Land Management Ordinance, it would have revealed what standards were in place to guide City staff on conditional use decisions. However, Appellants did not introduce the Land Management Ordinance.

The testimony of Ms. Stroud, who was called as a witness by the Appellants, suggests there was something in the City Code that would guide the staff on matters involving the RDV and conditional use issues. Ms. Stroud, under questioning by Appellants' trial counsel, referred to the City's code of zoning classification when she explained RDV and other zoning classifications. R. pp. 151-152. She testified at length during her direct examination by the Appellants' trial counsel about the conditions related to the conditional use classification and its purposes to protect the adjacent residential uses. She explained the primary conditions Staff would utilize, and she referred to the City's Board of Zoning Appeals and its role in making final determinations of conditional use issues. The Appellants' trial counsel did not ask Ms. Stroud if there were standards in the Land Management Ordinance to guide City staff. Whether the Land Management Ordinance established such standards, and whether they were constitutionally defective, was a matter for which the Appellants, not the City, had the burden of proof. Appellants failed to establish that there are no standards to guide City staff in determining the propriety of permitting conditional uses.

Since Appellants did not meet their burden of proof that the ordinance violated their due process and equal protection rights, the evidence they presented as to the impact of the ordinance on their property's fair market value is irrelevant. It is also insufficient to establish a factual issue as to whether the Appellants sustained any recoverable damage as a result of the ordinance. The ordinance has not resulted in a taking of Appellants' property. Mr. Hassiotis admitted that the property still has a beneficial use and value. R. p. 199, lines 19-22; p. 243, lines 2-15; p. 244, lines 20-25. A legislative body does not deny due process simply because it does not permit a landowner to make the most beneficial use of its property. Property owners are not entitled to have their property zoned for its most profitable use. An ordinance limiting the use of property will not be

held unconstitutional unless it is shown to have caused such a diminution in value as to be tantamount to confiscation. Bear Enterprises v. County of Greenville, 319 S.C. 137, 141, 459 S.E.2d 883, 886 (Ct. App. 1995).

Appellants failed to introduce evidence required to demonstrate a constitutional deprivation of Appellants' equal protection or due process rights.

III. BECAUSE THE APPELLANTS DID NOT ESTABLISH THAT THEY WERE DENIED THEIR DUE PROCESS AND EQUAL PROTECTION RIGHTS THE COURT DID NOT ERR IN DENYING THE APPELLANTS THEIR FEES AND COSTS.

The trial court found that Appellants failed to meet their burden of proof that their due process or equal protection rights were violated by the City. The trial court therefore correctly did not award attorney's fees and costs to Appellants, who did not prevail in the case.

IV. AS AN ADDITIONAL SUSTAINING GROUND FOR THE TRIAL COURT'S DECISION, THE CITY WAS ENTITLED TO A DIRECTED VERDICT AT THE CLOSE OF THE APPELLANTS' CASE AND AT THE CLOSE OF THE CITY'S CASE.

The City moved for a directed verdict at the close of Appellants' case and again after the City rested. R. p. 247; p. 292. As an additional sustaining ground for the trial court's decision, the City believes that it was entitled to a directed verdict pursuant to SCRCP Rule 50 (a).

When reviewing the denial of a motion for directed verdict, the court must consider the evidence in a light most favorable to the non-moving party. When the evidence yields only one inference, a directed verdict in favor of the moving party is proper. Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469,514 S.E.2d 126 (1999).

Viewing the evidence in a light most favorable to Appellants, the burden of proof required to create an issue of fact for a jury that the City violated the Appellants' equal protection or due

process rights was not met. The trial court should have granted a directed verdict in favor of the City.

CONCLUSION

Appellants failed to meet their burden of proof to establish a violation of their equal protection or due process rights. This Court should affirm the decision of the trial court granting judgment to the Respondent.

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Respectfully submitted,

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October 31, 2023
Greenville, South Carolina

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APPEAL FROM GREENVILLE COUNTY
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The City of Greenville, South Carolina,…….…….Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served the Brief of Respondent on Appellants George C. Hassiotis and Constantinon Hassiotis, by mail on October 30, 2023 to their attorney of record Scarlet B. Moore, at PO Box 17615, Greenville, South Carolina 29606 and by electronic mail at scarlet28@msn.com

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