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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Charles B. Simmons, Jr.

APPELLATE CASE NO. 2025-000416

McDaniel Jones, LLC…………...……………………………………Appellant,

v.

City of Greenville Planning Commission……………………………Respondent.

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ARGUMENT

I. THE COURT ERRED IN FINDING THAT THE RESPONDENT'S ACTION DID NOT CONSTITUTE A REGULATORY TAKING.

Respondent argues that deciding whether a regulatory taking occurs is essentially a math problem. (Resp. Br. 9) ("nearly all the value of property must be taken before a regulatory taking has occurred.") However, Penn Central specifically rejects any hard and fast rules in deciding whether regulatory taking has occurred. 438 U.S. 104, 124 (1978); see also Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 31 (2012) ("no magic formula"); Andrus v. Allard, 444 U.S. 51, 65 (1979) ("[t]here is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate"); Dunes W. Golf Club v. Town of Mt. Pleasant 401 S.C. 280, 314-15, 737 S.E.2d 601, 619 (2013) ("the United States Supreme Court repeatedly has declined to identify a specific threshold of interference with property rights below which no taking occurs and above which there is a taking"). Deciding whether a regulation is "so onerous that its effect is tantamount to a direct appropriation or ouster," Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005), is not purely made based on how much the regulation has denied a property owner's reasonable investment-backed expectations. The court must also consider the other facts surrounding the regulation, including the reasonableness of the property owner's expectations and the character of the government action.

The takings analysis and factual scenario in Dunes West differs substantially from this case. Dunes West involved the Town of Mt. Pleasant's ordinance rezoning all golf courses in the municipality to require owners to seek rezoning before developing the golf courses for anything other than recreational use. Dunes West, 401 S.C. at 316, 737 S.E.2d at 620.

Considering the character of the government action, the Court cited the trial court's finding that, "Preservation of open space and recreational opportunities, flood prevention and curbing ill effects of indiscriminate golf course conversions are all proper zoning considerations." Id. Further, the Court found that the ordinance "provides a 'clear reciprocity of advantage because it protects the interest of all affected landowners against immediate construction that might be inconsistent' with the Town's land-use planning goals." Id. at 317, 737 S.E.2d at 621.

Here, the regulation created by Respondent only applies to Appellant and does not apply to any other parcel. As such, it provides no reciprocity of advantage.

Further, considering the reasonableness of the property owner's investment backed expectations, the Court stated, "Appellant has failed to produce any evidence showing its 'expectations' were reasonable or investment-backed." Id. at 318, 737 S.E at 622. When it acquired the golf course property, the appellant "only casually approached the idea of converting a portion of the property to residential development and never submitted any formal development plan or subdivision plat." Id. at 319, 737 S.E.2d at 622. Further, it did not investigate the feasibility of any proposed development including failing to "take into account any wetlands, easements, or substantial changes to the golf course that would be required." Id.

The Court also found that "the record is devoid of any evidence showing Appellant substantially relied or materially altered its position based on the prior . . . zoning or its desire to develop residentially a portion of the Golf Course Property." Id. While the record showed "preliminary projections of costs and revenues associated with residential development of the Golf Course Property, there is no evidence that any of those expenditures were *actually* incurred." Id. at 320, 737 S.E.2d at 622 (emphasis in original). Finally, due to fact that the property was

rezoned after purchase, "the Vested Rights Act presented a potential opportunity to achieve the goal of residential development Appellant now seeks, yet Appellant offers no explanation for letting the opportunity pass without even attempting to avail itself of that prospect." Id.

Here, in contrast, Appellant researched the property in detail and purchased it specifically to develop it in conformance with the ordinances and regulations that were in place when Appellant purchased the property. The record reflects Appellant expended significant funds in furtherance of its expectation that those ordinances and regulations would be applied to this property and Appellant's application that complied with those ordinances and regulations would be approved. It was only after Appellant presented the application to Respondent, that Respondent changed the regulations to deny the application. However, as Respondent's was not a rezoning, the Vested Rights Act did not avail Appellant of the opportunity available to the appellant in Dune West. As such, while Dune West is direct authority for the framework to apply in this case, the facts presented in Dune West are entirely different from this case.

The facts of the other cases cited by Respondent are also significantly different from the facts presented here.

For example, in Pulte Home Corp., the plaintiff's speculative expectations were based on the defendant county's 1994 land development plan. Pulte Home Corp. v. Montgomery Cty., 909 F.3d 685, 689 (4th Cir. 2018). The court found that the plaintiff did not have a protected property interest because the plan "placed discretion in the hands of the local authorities" and the plan "plainly apprised all who read it that it was intended to be revised about every ten years." Id. at 693. Further, "even after prerequisites had been satisfied," the plan allowed "the County [to] delay action on water and sewer change applications, conduct further studies, or take whatever

land use actions it deemed necessary." Id. Because the plan granted the defendant great discretion to deny any land development application and because the plaintiff was not entitled to the sewer change necessary for its development, the court found that the plaintiff's expectations were too speculative to be protected.

In Esposito, the court held that the plaintiff had not established a taking where the plaintiff's claim was based solely on his property's loss of value after passage of South Carolina's Beachfront Management Act. Esposito v. S.C. Coastal Council, 939 F.2d 165, 170 (4th Cir. 1991). Appellant does not contend that diminished value, standing alone, can suffice to prove a taking.

In Henry, the plaintiff sought a Conditional Use Permit ("CUP") from the defendant planning commission. Henry v. Jefferson Cty. Com'n, 637 F.3d 269, 273 (4th Cir. 2011). However, the court found the plaintiff was not entitled as a matter of right to a CUP "because the issuance of [such a] permit is within the discretion of the [Planning Commission] under the ordinance." Id. at 275 (internal quotations omitted).

Similar to Pulte Homes, Quinn also involved a plaintiff alleging a taking based on the County failing to provide sewer service to lots that did not previously have sewer service. Quinn v. Bd. of County Comm'rs for Queen Anne's Cty., 862 F.3d 433, 439 (4th Cir. 2017). The court held that the plaintiff's "claim based on his lack of sewer service fails because he never had a property interest in obtaining that service" because "Maryland law does not create a property right in the access to a sewer system." Id. at 439-440.

Contrary to the cases cited by Respondent, Appellant had a distinct and reasonable investment-backed expectation that it was entitled to develop its property in conformance with the ordinances and regulatory scheme in place prior to Respondent creating a new definition for

neighborhood compatibility. Therefore, when considering the entire factual scenario of Respondent's government action, it is clear that a regulatory taking of Appellant's property for which just compensation must be paid has occurred.

II. THE COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF RESPONDENT ON APPELLANT'S EQUAL PROTECTION CLAIM BECAUSE RESPONDENT IS NOT A LEGISLATIVE BODY AND ITS ACTIONS ARE NOT PRESUMPTIVELY VALID.

Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues and thus provide the appellate court with a platform for meaningful appellate review. Herron v. Century BMW, 409 S.C. 563, 762 S.E.2d 693 (2012). In order to preserve an issue for appellate review, the issue must have been (1) raised to and ruled upon by the lower court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the lower court with sufficient specificity. S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 641 S.E.2d 903 (2007).

Appellant specifically argued that "presumptive validity" and the "fairly debatable" standards stated in Harbit v. City of Charleston, 382 S.C. 383, 390-91, 675 S.E.2d 776, 779-80 (Ct. App. 2009) do not apply to Respondent's actions as they would apply to actions by an elected legislative body like the City Council.

> 19 THE COURT: How does the fairly debatable
> 20 standard apply here, if at all?
> 21 MR. BANNISTER: That standard applies to when a
> 22 body that is granted the authority by the people that
> 23 voted for it, the legislative authority, the City
> 24 Council. When you talk about zoning boards of appeals,
> 25 when you talk about zoning through City Council but
>
> 1 actually deciding what is in the greater good of the
> 2 community, that is exclusively in the City Council's
> 3 purview. They cannot delegate that to the Planning
> 4 Commission to exercise City Council's legislative
> 5 authority.

6 So I would say, you cannot use that to say
7 whether or not the Planning Commission acted properly or
8 not, based on all of the public concerns in balancing
9 the burden. All of that is City Council's issue, not –
10 that is not in the purview of the Planning Commission.

(Trans. p. 34, line 19-p.35, line 10).

There are numerous reported cases analyzing and applying the presumption of validity and fairly debatable standard to elected legislative bodies such as Cities and Counties. See, e.g., Harbit, Lenardis v. City of Greenville, 316 S.C. 471, 450 S.E.2d 597 (Ct. App. 1994), Rushing v. City of Greenville, 265 S.C. 285, 217 S.E.2d 797 (1975), Rush v. City of Greenville, 246 S.C. 268, 143 S.E.2d 527 (1965), Knowles v. City of Aiken, 305 S.C. 219, 407 S.E.2d 639 (1991) and Bob Jones Univ., Inc. v. City of Greenville, 243 S.C. 351, 360, 133 S.E.2d 843, 847 (1963). However, there are no cases applying the presumption of validity and fairly debatable standard to a planning commission because planning commissions do not zone or rezone property. See S.C. Code Ann. § 6-29-340(B)(2).

Here, Respondent did not rezone any property. It simply created a new land development regulation defining neighborhood compatibility for the sole purpose of denying Appellant's application. The property continues to have the same zoning classification that it had before Appellant purchased it.

Therefore, as this is not a case where an elected legislative body zoned or rezoned property through an ordinance, the presumption of validity and fairly debatable standard do not apply.

CONCLUSION

For the reasons stated above as well as the arguments presented in the Brief of Appellant, Appellant respectfully requests that this Court reverse the judgment of the master-in-equity, find

that Respondent's action constituted a regulatory taking of Appellant's property without payment of just compensation and remand this case for further proceedings on the merits of Appellant's equal protection claim and to determine just compensation for Respondent's regulatory taking.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that I have served the *Initial Reply Brief* on Counsel of Record on this the 27th day of June, 2025, by electronic AIS e-mail only as follows:

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