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,

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant is a single-asset company created by Cothran Properties, LLC. (R. p. 101, lines 1-15; p. 661 ¶ 2). On July 26, 2018, Appellant purchased approximately 1.86 acres of real property located at 800 McDaniel Avenue in Greenville for $1,430,000. (R. pp. 73-75; p. 661 ¶ 1). Appellant's initial plan for development of the property was a project subdividing it into eight lots. (R. p. 234; p. 661 ¶ 4). Appellant secured an appraisal of the property dated January 2, 2019, which valued the property at $4,060,000. (R. pp. 235-238; p. 662 ¶ 5).

Appellant's initial plan for development of the property was similar to a plan submitted in early 2018 on behalf of Cothran Properties. (R. pp. 92-100; p. 662 ¶ 6). That application was to subdivide a 2.16-acre property at 733 Bennett Street in the City of Greenville from two lots into

eight lots. (R. pp. 299-300; p. 662 ¶ 6). At the hearing on the Bennet Street Application, there was concern voiced in public comment about the "number of lots to be created" and "concern over lot widths." (R. p. 299; p. 662 ¶ 8). However, Respondent did not discuss these concerns, but only discussed stormwater, whether the application conformed with city regulations and requirements, and proposed setbacks. (R. p. 299; p. 662 ¶ 8). Respondent approved the Bennett Street Application was by a vote of 6-0. (R. p. 300; p. 662 ¶ 9).

On December 12, 2018, Appellant submitted an application to City of Greenville Planning & Development (Application #SD 18-027) for a major subdivision containing six residential lots and one conservation/stormwater area comprised of the two remaining lots. (R. p. 323; p. 663 ¶ 15). Appellant's appraiser opined that if the property was divided into six lots it's value would have been $2,510,000. (R. p. 667 ¶ 30, 31).

At its January 17, 2019, meeting, Respondent admitted that Appellant's application complied with the language of all applicable zoning and ordinances except certain purpose and intent sections stated in City of Greenville Code of Ordinances which states:

> General purpose and intent. This section is intended to achieve neighborhood compatibility, maintain the harmony and character of established single-family residential areas, and guide residential infill development to occur in an orderly and desirable manner.

(R. pp. 318-319). At the meeting, Respondent utilized the purpose and intent language to define "neighborhood compatibility" with regards to Plaintiff's property "to require that newly-created subdivision lots be compatible in size and configuration to existing lots in the neighborhood." (R. p. 319). Based on Respondent's new definition of neighborhood compatibility, it denied Appellant's application by a vote of 0-7. (R. p. 324, pp. 666-667 ¶ 29).

Between July 1, 2018 and January 1, 2019, Appellant incurred significant expenses acquiring the property and preparing it for development totaling $1,509,399.95, including the purchase price. (R. pp. 332-334; p. 667 ¶ 32).

On November 5, 2020, Appellant filed a complaint alleging that Respondent's denial of Appellant's application for a preliminary plat to develop property owned by Appellant constituted a regulatory taking. (R. pp. 22-26). On December 21, 2020, Respondent filed its Answer denying it had taken Appellant's property. (R. pp. 27-31). On December 12, 2022, Appellant filed an amended complaint adding a cause of action alleging that the denial of the application violated Appellant's right to equal protection under the Fourteenth Amendment to the United States Constitution. (R. pp. 32-39). On December 22, 2022, Respondent filed its Answer again denying it had violated Appellant's constitutional rights. (R. pp. 56-62).

On October 31, 2023, Appellant filed a Motion for Partial Summary Judgment on the issue of whether Respondent's government action constitutes a regulatory taking of Appellant's property without payment of just compensation in violation of U.S. CONST. Amend. V and/or S.C. CONST. art. I, § 13(a). (R. pp. 63-72). On November 1, 2023, Respondent filed a Motion for Summary Judgment requesting judgment for Respondent as to all causes of action. (R. pp. 435-436).

On January 24, 2025, the Honorable Charles B. Simmons, Jr. heard both parties' motions. (R. p. 615, line 12). At the hearing, the parties submitted a set of Stipulated Facts. (R. pp. 661-669). At the hearing, the parties also agreed and requested that the court make an ultimate decision on the stipulated facts and exhibits. (R. p. 621, lines 11-16).

On February 5, 2025, the court filed an Order denying Appellant's Motion for Partial Summary Judgment and granting Respondent's Motion for Summary Judgment. (R. pp. 5-21). On March 3, 2025, Appellant timely filed a Notice of Appeal. (R. pp. 670-672).

STANDARD OF REVIEW

In reviewing the grant of summary judgment, the reviewing court applies the same standard as the circuit court. Byrd v. City of Hartsville, 365 S.C. 650, 656, 620 S.E.2d 76, 79 (2005). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. The court must view the evidence and all reasonable inferences taken from it in the light most favorable to the non-moving party. Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001).

ARGUMENT

I. THE COURT ERRED IN FINDING THAT THE RESPONDENT'S ACTION DID NOT CONSTITUTE A REGULATORY TAKING WHERE WEIGHING THE FOLLOWING FACTORS SUPPORT A CONCLUSION THAT A REGULATORY TAKING OCCURED.

The question of whether a taking has occurred is a question of law that the reviewing court reviews *de novo*. Dunes W. Golf Club, L.L.C. v. Town of Mt. Pleasant, 401 S.C. 280, 314, 737 S.E.2d 601, 619 (2013) (first citing Carolina Chloride, Inc. v. Richland Cnty., 394 S.C. 154, 171, 714 S.E.2d 869, 877 (2011); and then citing Ex Parte Brown, 393 S.C. 214, 224, 711 S.E.2d 899, 904 (2011)).

The Fifth Amendment to the United States Constitution provides that private property shall not "be taken for public use, without just compensation." U.S. Const. Amend. V. "Inverse

Condemnation is a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." Graham v. Town of Latta, 417 S.C. 164, 191, 789 S.E.2d 71, 85 (Ct. App. 2016).

"South Carolina courts have embraced federal takings jurisprudence as providing the rubric under which we analyze whether an interference with someone's property interests amounts to a constitutional taking." Hardin v. SCDOT, 371 S.C. 598, 604, 641 S.E.2d 437, 441 (2007) (citing Byrd, 365 S.C. at 656 n.6, 620 S.E.2d at 79 n.6). "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

To determine if a regulation goes too far, the court must engage in an "essentially ad hoc, factual inquir[y]." Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). There is "no magic formula" to determine if government interference with property constitutes a taking. Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 31 (2012). "There is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate [and] [r]esolution of each case . . . ultimately calls as much for the exercise of judgment as for the application of logic." Andrus v. Allard, 444 U.S. 51, 65 (1979).

However, the federal and South Carolina decisions regarding regulatory takings have identified three factors that have particular significance when performing these factual inquiries: "[t]he character of the government action, the economic impact of the regulation on the claimant, and the extent to which the regulation has interfered with distinct investment-backed expectations." Dunes West, 401 S.C. at 315, 737 S.E.2d at 620 (citing *id.*).

A. THE ECONOMIC IMPACT OF RESPONDENT'S GOVERNMENT ACTION ON APPELLANT'S DISTINCT INVESTMENT-BACKED EXPECTATIONS WEIGHS IN FAVOR OF A FINDING THAT A REGULATORY TAKING OCCURRED.

"The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations." Penn Central, 438 U.S. at 124; *see also* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 n.8 (1992) ("as we have acknowledged time and again, 'the economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally").

Forgetting that there is no magic formula in this area of law and attempting to create a formulaic set of rules for regulatory takings cases, trial courts may misconstrue the U.S. Supreme Court's jurisprudence to create two separate elements for economic impact and investment-backed expectations. However, time and again, the Supreme Court has reiterated that the *Penn Central* test is the basis for this type of case. *See, e.g.*, Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005) ("Outside these two relatively narrow categories . . . regulatory takings challenges are governed by the standards set forth in *Penn Central*"). And *Penn Central* clearly holds that a court should assess the economic impact of the government action with particularity to the investment-backed expectations of the claimant. Penn Central, 438 U.S. at 124.

The trial court fell into this same trap – gauging the economic impact on Appellant rather than the economic impact on Appellant's investment-backed expectations. (R. p. 11) (comparing the price Appellant purchased the property against the price Appellant sold the property).

However, pursuant to the *Penn Central* standards, the economic impact on Appellant's investment-backed expectations was significant. Appellant invested $1,509,399.95 acquiring the

property and preparing it for development. (R. p. 667 ¶ 32). This was not a "paper-only" project, but one where Appellant invested real money in concrete steps taken in furtherance of developing the property with a reasonable expectation that the investment would bear fruit. Appellant's expected value of the total property before Respondent's action was $2,510,000.00. Therefore, the economic impact on Appellant's investment-backed expectations was $1,000,600.05 or 39.8% of Appellant's investment and not the 2% diminution of property value found by the court, (R. p. 11).

Further, based on the regulations and ordinances in effect when Appellant purchased the property, Appellant was entitled to subdivide the property into six lots, with each lot being valued from $400,000 to $500,000. Appellant was not required to and did not apply for a variance because none was necessary to achieve Appellant's expected subdivision. The impact of Respondent's action to reduce even one lot is to completely eliminate Appellant's expected value of that lot, a 100% diminution in value.

Therefore, the economic impact of Respondent's government action on Appellant's investment-backed expectations weighs in favor of a finding that a regulatory taking occurred.

B. APPELLANT'S DISTINCT INVESTMENT-BACKED EXPECTATIONS WERE REASONABLE WHEN APPELLANT PURCHASED THE SUBJECT PROPERTY.

"For government regulation to constitute a taking, the property owner must objectively demonstrate the existence [of] tangible investment-backed expectations." Dunes West, 401 S.C. at 320, 737 S.E.2d at 622. It is not enough to have development prospects; the property owner must show "concrete steps taken in furtherance of prospective residential development." Id. "The purpose of consideration of plaintiffs' investment-backed expectations is to limit recoveries to

property owners who can demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime." Cienega Gardens v. United States, 331 F.3d 1319, 1345-46 (Fed. Cir. 2003) (quotations and citations omitted); *see also* Columbia Venture, LLC v. Richland Cnty., 413 S.C. 423, 449, 776 S.E.2d 900, 914 (2015). "A property owner's reasonable investment-backed expectations are defined at the time the property is purchased." Norman v. United States, 63 Fed. Cl. 231, 267 (2004) (citation omitted).

"[T]he regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations.'" Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1348 (Fed. Cir. 2004) (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring)). A landowner has a vested right to use property in compliance with State laws and regulations and City ordinances even where the property is later subjected to a prohibitive ordinance. See Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals, 342 S.C. 480, 499, 536 S.E.2d 892, 499 (Ct. App. 2000). "[T]he substantial value of property lies in its use." James v. City of Greenville, 227 S.C. 565, 579, 88 S.E.2d 661, 668 (1955) (citing Henderson v. City of Greenwood, 172 S.C. 16, 172 S.E.2d 689 (1940)). "If the right of use [is] denied, the value of the property is annihilated, and ownership is rendered a barren right." Id.

"The subjective expectations of the [claimant] are irrelevant." Chancellor Manor v. United States, 331 F.3d 891, 904 (Fed. Cir. 2003) (citation omitted). "The critical question is what a reasonable owner in the [claimant's] position should have anticipated." Id.

As such, the critical question is whether Appellant was reasonable in anticipating that it was able to subdivide the property into six lots when it purchased the property.

When Appellant purchased the property, subdivision of the property into six lots was allowed by the ordinances and regulations of Respondent. In denying Appellant's application, Respondent relied upon the "General purpose and intent" section[1] of its land development ordinance; however, Respondent admitted that Appellant's application "complies with the language of the applicable zoning and ordinances except the purpose and intent section[]." (R. p. 319). Finally, Respondent had never denied another subdivision application based on neighborhood compatibility prior to Appellant's application. (R. pp. 338-434).

Further, On August 16, 2018, only four months prior to Respondent denying its application, Appellant had been approved for a similar subdivision application on Bennett Street in the City. Appellant's owner specifically testified in his deposition that Respondent's approval of the Bennett Street application was a consideration when he was deciding on a purchase price for Property. (R. p. 115, lines 17-25):

> 17 Q Tell me what you can about the negotiations that got
> 18 y'all to that purchase price.
> 19 A Well, it was a while ago. So, you know, the ones you
> 20 remember are probably the ones you don't buy; right?
> 21 So, became aware of the property. We were aware of
> 22 what we had just done at Bennett Street, and we were
> 23 like looking at this going, well, this is even better
> 24 because, you know, probably less development and more
> 25 potential profit. So it was owned by a trust, I

Approving the Bennett Street application, Respondent did not consider or define neighborhood compatibility. Instead, Respondent only concerned itself with whether the

[1] "General purpose and intent. This section is intended to achieve neighborhood compatibility, maintain the harmony and character of established single-family residential areas, and guide residential infill development to occur in an orderly and desirable manner." City Code § 19-6.9.1.

application conformed with the existing regulations and requirements and approved the application.

Therefore, it was reasonable for Appellant's expectations, at the time of purchasing this property, to be that Respondent would follow the statutes, ordinances, and regulations in place at the time of purchase and approve Appellant's application.

Instead of relying upon Appellant's expectations at time of purchase, the trial court relied heavily on feedback Appellant received, not from Respondent, but from the public after Appellant purchased the property. Appellant attempted to engage with the public with meetings to understand their concerns, (R. p. 13), but the inference that Appellant should be forced to conform his expectations to the mob are totally without precedent. For property rights to have any value they must be based on the rules and regulations that elected officials have put in place at the time a buyer purchases the property and not on the whims of neighbors who could have purchased that same property. Further, these concerns were voiced after Appellant purchased the property and are irrelevant to Appellant's investment-backed expectations at the time of purchase.

The court also relied upon a statement by Respondent that "a five lot subdivision would be a more acceptable proposal." (R. p. 14). However, just because less lots would be more acceptable to Respondent, it did not offer to actually approve a five-lot subdivision and a five-lot subdivision still would have faced severe public opposition. More importantly, Appellant's consideration of offers or non-offers from Respondent after it purchased the property has no effect on the critical question of whether Appellant was reasonable in anticipating that it was able to subdivide the property into six lots *when it purchased the property*.

Therefore, Appellant's investment-backed expectations were reasonable when it purchased the subject property.

C. THE CHARACTER OF THE GOVERNMENT ACTION BY RESPONDENT NECESSITATES A FINDING THAT THERE WAS A REGULATORY TAKING WHERE THE ACTION BURDENED ONLY APPELLANT.

"The 'character of the Government action' prong of the *Penn Central* analysis examines 'the *magnitude or character of the burden* a particular regulation imposes upon private property rights' and 'how any regulatory burden is distributed among property owners.'" Columbia Venture, 413 S.C. at 451, 776 S.E.2d at 915 (emphasis in original) (quoting Lingle, 544 U.S. at 542). In evaluating the benefits and burdens of a government regulation, "a taking does not take place if the prohibition applies over a broad cross section of land and thereby 'secure[s] an average reciprocity of advantage.'" Penn Central, 438 U.S. at 140 (quoting Mahon, 260 U.S. at 415) (noting that the concept of "reciprocity of advantage" is the reason zoning does not constitute a taking and stating "[w]hile zoning at times reduces individual property values, the burden is shared relatively evenly and it is reasonable to conclude that on the whole an individual who is harmed by one aspect of the zoning will be benefitted by another").

However, "the Fifth Amendment 'prevents the public from loading upon one individual more than his just share of the burdens of government and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.'" Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 83 n.7 (1980) (quoting Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893)); *see also* Lucas, 505 U.S. at 1071; Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470, 512-13 (1987). "The Fifth Amendment's guarantee that private property shall not be

taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960). As such, "takings law frequently looked to the *generality* of a regulation of property." Lucas, 505 U.S. at 1072 (emphasis in original).

Respondent's regulation lacks generality to so great an extent that it is specific to one entity, the Appellant. Effectively, Respondent has fashioned itself into an unelected zoning authority; however, it is a zoning authority that only applies its regulations to specific parcels instead of whole neighborhoods and communities. This is why the Bennett Street Application in another area of the City could be approved and Appellant's application denied when both neighborhoods expressed similar concerns about the applications.

Further, when land-use regulations are applied in this fashion, there can be no reciprocity of advantage as required by *Mahon*. The burden of the regulation imposed by Respondent applies only to Appellant. It does not apply to a broad section of land; as such, Appellant's property gains no reciprocity of advantage. If an entire neighborhood or community share the burdens and benefits of land regulations, courts should not decide how to allocate those burdens and benefits to specific property owners. However, Respondent's regulation forces Appellant to take all of the burdens and receive none of the benefits. The neighboring property owners who voiced their concerns about Appellant's application are not subject to the regulation they asked Respondent to impose upon Appellant. They can apply to subdivide their land and, at the whim of Respondent, be approved or denied.

"[T]he Fifth Amendment 'prevents the public from loading upon one individual more than his just share of the burdens of government and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, *a full and just equivalent shall be returned to him*.'" Pruneyard, 447 U.S. at 83 n.7 (quoting Monongahela Navigation, 148 U.S. at 325) (emphasis added). The Fifth Amendment requires a governmental body to compensate an individual fully when the governmental body specifically takes a property right from that individual as opposed to taking the right generally from all members of the community.

Therefore, the character of Respondent's government action necessitates a finding that a regulatory taking of Appellant's property rights occurred.

II. THE COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF RESPONDENT ON APPELLANT'S EQUAL PROTECTION CLAIM WHERE THE COURT INCORRECTLY APPLIED ZONING JURISPUDENCE TO EVALUATE RESPONDENT'S ACTION.

No person shall be denied equal protection of the law. U.S. Const. Amend. XIV, § 1; S.C. CONST. ART. I, § 3; Sunset Cay, L.L.C. v. City of Folly Beach, 357 S.C. 414, 428, 593 S.E.2d 462, 469 (2004). "The *sine qua non* of an equal protection claim is a showing that similarly situated persons received disparate treatment." Grant v. S.C. Coastal Council, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995). Where an alleged equal protection violation does not implicate a suspect class or abridge a fundamental right, the rational basis test is used. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000); Dunes West, 401 S.C. at 293, 737 S.E.2d at 608; Sunset Cay, 357 S.C. at 428-29, 593 S.E.2d at 469. To prevail under the rational basis standard, a claimant must show similarly situated persons received disparate treatment, and that the disparate treatment did not

bear a rational relationship to a legitimate government purpose. Dunes West, 401 S.C. at 293-94, 737 S.E.2d at 608; Bibco Corp. v. City of Sumter, 332 S.C. 45, 53, 504 S.E.2d 112, 116 (1998).

Equal protection claims often occur in zoning or rezoning matters; however, this case does not involve a zoning matter. Zoning and rezoning is a legislative matter and Respondent is not a legislative body entitled to pass or change ordinances. See S.C. Code Ann. § 6-29-340(B)(2) (a planning commission is empowered to "prepare and *recommend for adoption to the appropriate governing body* . . . zoning ordinances to include zoning district maps and appropriate revisions thereof . . ." (emphasis added)). Instead, Respondent is an administrative body empowered to enforce the City's ordinances. See Peterson Outdoor Advertising v. City of Myrtle Beach, 327 S.C. 230, 234-35, 489 S.E.2d 630, 632 (1997) ("[A] municipality may delegate the administration of its ordinances to a board provided the board's discretion is sufficiently limited by clear rules and standards."). As such, this case involves a land use regulation created by an unelected administrative body and initially applied only to Appellant.[2]

Because this case does not involve a zoning decision by a legislative body, the court was incorrect to presume the validity of Respondent's action pursuant to Harbit v. City of Charleston, 382 S.C. 383, 675 S.E.2d 776 (Ct. App. 2009), (R. p. 15). See Id. at 390, 675 S.E.2d at 779-80 ("The *legislative body's* decision in *zoning matters* is presumptively valid") (emphasis added). The court was also incorrect in applying the "fairly debatable" standard to Respondent's action.

[2] Appellant challenged Respondent's power to create a new land use regulation by defining neighborhood compatibility, but Respondent's discretion to do so was upheld by the circuit court, which held "these purpose and intent sections allow the Planning Commission to define neighborhood compatibility." (R. p. 319).

See Id. at 391; 675 S.E.2d at 780 (citing Knowles v. City of Aiken, 305 S.C. 219, 223, 407 S.E.2d 639, 642 (1991)).

Further, it is clear that Appellant received disparate treatment from all other similarly situated persons because Appellant received disparate treatment from all other persons. Respondent's action only applied to Appellant, it does not apply to any other entity, person, or property including Appellant's neighbors who protested against Appellant's application.

Finally, the court erred in finding that there is "no evidence of similarly situated property owners who applied for a subdivision plat and were granted the application." (R. p. 18). Appellant's application was similar to a subdivision plan previously submitted by Cothran Properties, LLC to subdivide a 2.16-acre property into eight lots. (R. pp. 299-300; R. p. 622 ¶ 6). For that application, Respondent did not discuss or define "neighborhood compatibility" and approved the application unanimously. (R. p. 299; p. 622 ¶¶ 8,9). As such, evidence was presented that a similarly situated property owner in a different neighborhood was given disparate treatment from Appellant.

Therefore, the court's judgment in favor of Respondent on Appellant's equal protection claim should be reversed.

CONCLUSION

For the foregoing reasons, 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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