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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
G.D. Morgan, Jr., Circuit Court Judge

Appellate Case No. 2026-001445

Alliance to Preserve the Old White Horse Road Corridor, LLC
and Mary Jean Horney,

Respondents,

v.

RP&L, LLC and Greenville County Planning Commission,

Of which, Greenville County Planning Commission is

Petitioner.

**REPLY TO RESPONDENTS' RETURN TO
PETITION FOR WRIT OF CERTIORARI**

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ARGUMENTS

In what may be described as irony, it is the Respondents' Return to Petition for Writ of Certiorari that perhaps demonstrates most vividly why a writ of certiorari is warranted in this case. Indeed, given the Court of Appeals' decision and the Respondents' arguments in an attempt to support that decision, it should be clear that there exists much confusion and disagreement as to what a planning commission meeting is, what it is intended to accomplish, how a meeting of a planning commission should be conducted, what level of due process is required, and whether a planning commission must issue a formal order with findings of fact and conclusions of law.

As a principal issue raised in its petition, the Petitioner Greenville County Planning Commission asserts that the Court of Appeals erred in both ruling that the record was insufficient to allow for a meaningful review of the Planning Commission's decision while also ruling that there is "no evidence" establishing the proposed development satisfies all three criteria of LRD Article 3.1, which are inconsistent rulings. To recap, the Court of Appeals found that there is not a "sufficient record to allow meaningful review of the Commission's 5-4 decision to approve RP&L's preliminary subdivision application." (Slip Op. at 7). Nonetheless, despite finding that the record was "insufficient" for a meaningful review, the Court of Appeals then proceeded to fully analyze the evidence in the record and concluded that "there is no evidence establishing the proposed development satisfies all three criteria of LRD Article 3.1." (Slip Op. at 8).

In response, the Respondents disregard this obvious inconsistency and claim instead that "the Planning Commission failed to exercise its discretion by announcing the grounds for its decision." *See*, Return, p. 16. Yet, in taking that position, the Respondents ignore that they

actually lost on that issue as the Court of Appeals did agree with the circuit court that “the applicable statutes do not require the Planning Commission to issue a formal written decision setting forth findings of fact and conclusions of law.” (Slip Op. at 7). The Court of Appeals, however, is partly to blame for confusion because while stating that a formal written decision is not required, the Court then complained that “[t]here is nothing in the record indicating the Planning Commission’s reasons for approval, and it is unclear what facts the Planning Commission deemed established.” (Slip Op. at 7). The Court further complained that it could not “discern how the Planning Commission applied these ‘facts’ to the LDR and applicable zoning ordinances” nor could the Court “decipher the divided Commission’s reasoning from its series of questions and answers.” (Slip Op. at 7).

In actuality, both the Court of Appeals and the Respondents are in error in that they have entirely disregarded the guidance previously provided by this Court in *Kurschner v. City of Camden Planning Commission*, 376 S.C. 165, 656 S.E.2d 346 (2008). In that case, this Court established the parameters for the due process to which parties to a local planning commission proceeding are entitled. As an initial observation, this Court recognized that “due process does not require a trial-type hearing in every conceivable case of government impairment of a private interest. Rather, due process is flexible and calls for such procedural protections as the particular situation demands.” 656 S.E.2d at 350. The Court then concluded that “due process does not require the full gamut of rules and procedures to which the Kurschners claim they were entitled. While due process may require a trial-type hearing in fact-specific, adjudicatory decisions of an administrative body, the power exercised by the Commission and the individual interests at stake in this case are *very different*.” *Id.* (Emphasis added). This Court further recognized that a decision on a subdivision application or plan is “an exercise of discretionary authority, as

opposed to adjudicatory power,” on the basis that “[t]he legislature expressly granted this discretionary authority in the area of local planning to the Commission.” *Id.* In short, this Court in *Kurschner* held that “[t]he fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review.” *Id.* Indeed, this Court rejected the request for an array of due process protections and focused on the requirement that the parties be afforded “a meaningful opportunity to be heard.” *Id.*

Not surprisingly, *Kurschner* is not cited a single time by the Respondents in their return. Moreover, while the Court of Appeals cite *Kurschner* in the “standard of review” section of its opinion, the critical aspects of *Kurschner* in addressing the process due in a planning commission meeting are overlooked entirely. That is why the Planning Commission has sought a writ of certiorari -- because *Kurschner* clearly needs to be reaffirmed and properly applied to this case.

From *Kurschner*, it should be quite evident that a planning commission meeting is not intended to be “a trial-type hearing [resulting] in fact-specific, adjudicatory decisions.” *Kurschner*, 656 S.E.2d at 350. In fact, as this Court explained, a planning commission meeting is “very different.” *Id.* In the case at bar, the Court of Appeals did not see it that way. Despite there being a 5-4 vote, meaning that there were nine decision-makers who likely had differing reasons for deciding the issue as they did, the Court of Appeals and the Respondents expect to be told “what facts the Planning Commission deemed established.” (Slip Op. at 7). The Respondents take that premise a step further by insisting that, in the absence of being told the grounds for the decision, the Court should infer that the Planning Commission failed to exercise any discretion. The Respondents go even further yet to complain that a staff report is not

“evidence” and that the engineer’s statements during the meeting are “nothing more than classic hearsay.” *See*, Return, p. 13.¹

Frankly, as this Court recognized in *Kurschner*, that is not the role of a planning commission, and its decision, which is based on discretionary authority granted by the General Assembly, is akin to a jury’s verdict. Moreover, the review process by an appellate court – be it the circuit court or the Court of Appeals or this Court – is limited in the same way an appellate court’s review of a jury verdict is limited. In the absence of an error of law, the factual determination and ultimate decision by the planning commission – like a jury – must be affirmed where there is “any evidence” to support it.

In the case at bar, the Court of Appeals initially acknowledged that the findings of fact by the Planning Commission “must be treated in the same manner as a finding of fact by a jury.” (Slip Op. at 5). But the Court did not follow through and actually apply that premise. But it is that basic rule of law which provides the controlling answer in a case like this and resolves the confusion that has resulted. Quite simply, a planning commission’s decision is to be treated like a jury’s determination. The only difference is that a planning commission’s decision need not be unanimous, but a lack of unanimity does not violate due process. Like a jury, the planning commission has multiple decision-makers who may have different reasons to come to a decision. After a jury verdict is published, the jury is not required to offer its findings of fact (unless special interrogatories are used), and the appellate court reviewing that verdict must do so without the benefit of such findings of fact. That review is conducted without knowing how the jury “applied” the facts and without being able to “decipher the jury’s reasoning.” Instead, in the

¹ *See*, *Kurschner*, 656 S.E.2d at 350 (pointing out there is “no authority for excluding hearsay evidence in planning commission decisions”).

absence of an error of law, the reviewing court looks at whether there is “any evidence” to support that decision. The appellate review of a planning commission decision should be no different. And certainly, where there is a 5-4 vote, the reviewing court should not focus on or give weight to the comments and opinions voiced during a hearing by the planning commission members who voted in the minority. Yet, that is what the Court of Appeals did here. The reviewing court should also not treat the losing party’s “contentions” (or anyone’s “contentions” for that matter) as evidence that overrides anything else in the record. (Slip Op. at 11-12). Yet, that is what the Court of Appeals did here. Finally, a reviewing court should not, in the face of conflicting evidence, weigh the evidence and given credence to the opinions of the “proprietor” of Firstfruits Farm of South Carolina, LLC (Donald Woodard) over the project’s engineer (Kevin Tumblin) on stormwater issues. Yet, that is what the Court of Appeals did here.

To summarize, what has been missed by the Court of Appeals and the Respondents is the premise, as articulated in *Kurschner*, that a planning commission meeting is not a trial. Indeed, a planning commission meeting is “very different” from a “trial-type hearing” resulting in a “fact-specific, adjudicatory decision.” *Kurschner*, 656 S.E.2d at 350. As this Court has recognized, a decision on a subdivision application or plan is “an exercise of discretionary authority, as opposed to adjudicatory power.” *Id.* The Court of Appeals and the Respondents, however, perceive the planning commission’s role much differently – as a body exercising “adjudicatory power” much like a court. That is not the case.²

² In multiple places in their return, the Respondents cite to Rule 242(b), SCACR, and claim that the Planning Commission “made no effort whatsoever” to identify one of bases for granting a writ of certiorari. Needless to say, that does not constitute a correct reading of the petition. Indeed, the Planning Commission explained that “the issuance of a writ of certiorari is warranted in this case to reaffirm the applicable standard of review as articulated in *Kurschner*, *supra*, and to confirm that it is the Planning Commission’s role, like that of a jury, to weigh the evidence.” *See*, Petition, p. 12. In its petition, the Planning Commission pointed to very specific

If the present case is reviewed, as this Court intended with its due process analysis in *Kurschner*, the result is clear – which is how the circuit court viewed it. The Respondents have pointed to no error of law committed by the Planning Commission. Instead, the appellate courts are limited to viewing the record and assessing whether there is “any evidence” to support the 5-4 decision of the Planning Commission. Based on the review of the factual record outlined in the petition itself, it is clear that the “any evidence” standard is met. The decision of the Planning Commission should be affirmed and reinstated.

It should not be lost on this Court that the Court of Appeals published its decision thereby making it precedential. Thus, the current jurisprudence guiding litigants and judges has been rendered unclear by the decision in this case. On one hand, there is *Kurschner*, and on the other hand, there is this case. The two reported decisions are not consistent, which is creating confusion that should not exist. As *Kurschner* recognizes, the role of a planning commission and the discretion it exercises are unique, but it cannot be confused with being a court of law or treated as a court of law. Indeed, it would be absolutely impractical for an appointed body of volunteers which typically meets once a month and hears multiple applications at each meeting to be treated as an adjudicatory body issuing written decisions requiring a consensus from multiple members as to findings of fact and conclusions of law. Appellate courts with multiple judges working full-time can take months to achieve a consensus and issue written decisions of that type, while even single judges working full-time also can take months to issue adjudicatory decisions. How would a body that meets once a month whose members are not employed on a full-time basis achieve that? The answer is in *Kurschner*. That is not its role. As this Court has

instances where the Court of Appeals veered from the standard of review identified in *Kurschner*. That is another way of stating the obvious – the Court of Appeals decision is in conflict with this Court’s decision in *Kurschner*.

stated, a planning commission is not a body exercising “adjudicatory power,” and it is not intended to hold “trial-type hearings” resulting in “fact-specific, adjudicatory decisions.” *Kurschner*, 656 S.E.2d at 350. While this Court stated that in *Kurschner*, it needs to be said again, and this case provides this Court that opportunity to end any confusion that the Court of Appeals decision has fostered.³

CONCLUSION

Based on the foregoing discussion, the Petitioner Greenville County Planning Commission respectfully requests that this Court grant its Petition for Writ of Certiorari.

Respectfully submitted,

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³ As for the remaining issues, the Planning Commission relies on its petition.