

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF BERKELEY

) CASE NO.: 2017-CP-08-01088

Todd Olds,

Plaintiff,

vs.

Berkeley County and Berkeley County  
Planning Commission,

Defendants.

**RECEIVED**

AUG 10 2020

ORDER

SC Court of Appeals

This matter came before me for hearing as Special Referee by consent of the parties on December 10, 2019.

Present at the hearing were Thomas Goldstein, Esq. of the Charleston County Bar, attorney for the Plaintiff, and his client Todd Olds; John S. West, Esq. and John O. Williams, II, Esq., each of the Berkeley County Bar, attorneys for the Defendants.

The parties have each submitted substantial briefs as supplemented and a stipulated set of exhibits. I have carefully examined and considered these filings as well as the arguments of counsel.

**THE ISSUE FOR DETERMINATION**

The matter began on January 24, 2017, when the Plaintiff applied to the Berkeley County Council to rezone a 1.1-acre parcel at 751 Royle Road from R-2 (residential mobile home) to R-3 (commercial mobile home) to match the zoning on his adjoining parcel at 749 Royle Road. (T.M.S. Numbers 233-09-02-046 and 233-09-02-007). At the time of Plaintiff's application, he had fifteen

mobile homes on 749 Royle Road, the R-3 lot, and three<sup>1</sup> on 751 Royle Road. Plaintiff seeks to have both lots zoned R-3, which, if approved, would allow him to combine the two lots and have a total of twenty-seven mobile homes on them.

The County Planning Department staff recommended approval of the rezoning request "as it provides an opportunity for the development of a diversity of housing options, which align with the Future Land Use Plan and are compatible in the context of the area concerned." The Planning Committee, after holding a public hearing, voted to recommend denial of the request. County Council subsequently voted to deny the request. Plaintiff then filed this suit challenging the legality of the County's refusal to rezone 751 Royle Road.

Plaintiff advances four arguments: First, that the County's refusal to rezone 751 Royle Road to R-3 was arbitrary and unreasonable or capricious and contrary to law; second, that it violated his constitutional right to substantive due process; third, that it violated his constitutional right to equal protection; and fourth, that it violated his constitutional right to procedural due process. The parties have agreed that the only issue that is presently ripe for determination is the Plaintiff's first argument, whether the County's refusal to rezone his property was arbitrary and capricious and contrary to law.<sup>2</sup>

<sup>1</sup> The Record at some places says that he currently has three homes on the subject parcel. Elsewhere it says that he has two. The difference is immaterial for purposes of the analysis undertaken here.

<sup>2</sup> It appears that this issue implicates at least substantive due process. "The governing bodies of municipalities clothed with authority to decide residential and industrial districts are better qualified by their knowledge of the situation to act upon these matters than are the courts, and their decisions will not be interfered with unless there is a plain violation of the constitutional rights of citizens." *Harbit v. City of Charleston*, 382 S.C. 383, 675 S.E.2d 776 (S.C. Ct. App. 2009). Thus, a finding as to the validity of the County's refusal to rezone Plaintiff's property requires a determination of whether it violates Plaintiff's constitutional rights. Nevertheless, this Order should not be construed as deciding any constitutional issues beyond what is specifically necessary to determine whether the County's action was arbitrary and capricious and contrary to law.

### THE RECORD

The parties agree upon the procedural record before me. They have stipulated to the accuracy, propriety, and completeness of the record for my consideration, which they will file with the Clerk of Court and is incorporated herein by reference. The record embodies and constitutes the salient facts upon which I intend to and do rely in issuing my order and judgment below.

In summary, the record reflects that by application presented to the Berkeley County Planning Department, the Plaintiff/applicant sought to rezone a parcel of land in Berkeley County, South Carolina bearing TMS #233-09-02-046, from an R-2 to an R-3 zoning designation. He did not seek a special exception or variance, but rather sought to rezone the parcel. A successful rezoning would enable the owner to increase the total number of mobile homes on both lots to twenty-seven.

At the time of his application there were two (or three) mobile homes on the subject parcel, each legally non-conforming. Berkeley County Planning Department staff reviewed Appellant's application and recommended that the rezoning request be approved. At a Planning Commission public hearing held on February 28, 2017, staff Planner Ty Adler introduced and explained the application for change in zoning classification. He explained that the applicant intended to rezone 751 Royle Road to R-3 and then combine it with the adjacent 749 Royle Road, which was already zoned R-3. Mr. Adler stated that the proposal aligned with the Comprehensive Plan and would enhance diversity in housing. For these reasons staff recommended approval of the request. Plaintiff/applicant spoke in favor of the request. Several neighboring property owners spoke against the requested rezoning. No member of the general public spoke in favor of the request. The comments are summarized below along with comments later presented to County Council. After hearing from the public and considering the merits of the application for rezoning, the

Planning Commission voted unanimously to recommend to the County Council that it deny the rezoning request.

The matter then continued according to the ordinary procedure and was brought before the County's Land Use & Economic Development Committee on March 13, 2017. Planning staff reported on the status of the application. In her presentation before the Committee, Planning and Zoning Director Alison Simmons testified as follows:

“... Planning Commission recommended denial in a unanimous vote after reviewing the requested change and hearing from many community stakeholders in opposition to the request. Planning Commission found the request incompatible and potentially detrimental in the context of the community concerned. Members of the community present verbalized concerns regarding traffic, saturation of mobile home parks in the area and the diminution of property values and quality of life...”

Following receipt of input from the public and discussion by members of the committee, the Land Use & Economic Development Committee voted 6-2 to deny the rezoning request.

The matter was then presented to the full County Council for action on the proposed ordinance to rezone the subject property at its March 27, 2017 meeting. A Planning staff member again introduced the application and explained it. Plaintiff/applicant spoke in favor of his application. Members of the public appeared and expressed a variety of concerns in the “Public Discussion” period of the hearing, similar to the concerns previously voiced to the Planning Commission. When the question of consideration of first reading on the proposed ordinance to rezone the subject property came for a vote by County Council, Council voted 5-2 to deny the rezoning request.

As reflected in the summary minutes and the video recordings of the proceedings, throughout consideration of the rezoning proposal, opinions for and against the proposal were voiced and for a variety of reasons.

Excerpts of testimony and comments from the video recording of the February 28 and March 27 meetings include *inter alia*:

- Plaintiff/applicant spoke in support of his application, He stated that he intended to put a quality mobile home park on the property. He did not intend to put "trash" there. He would place security lighting, require vinyl siding, and improve the access road. He said that he intended to own the mobile homes in the park except those that are already there. He stated that this would not be a "thug park." He would "vet" the people applying to live there and would have strict leases. He would allow the Sheriff to have full access. He stated that there is no crime in his North Charleston mobile home park. He intended this to be a quality park and provide affordable housing in accordance with the County's Comprehensive Plan.

Several nearby residents spoke in opposition to the application. Among the statements that they made included the following:

- There is an overabundance of mobile homes in the area. the property is too small for twenty-four mobile homes. He is concerned about children playing in the road.
- The area is saturated with mobile home parks. He is concerned about drug problems, traffic, and children having no place to play.
- He does not want lights and trailers. Kids have come onto his property from the existing mobile home park and gotten into his swimming pool.
- She has had problems with kids in the mobile home park partying and coming across the fence onto her property.
- His property will not appraise for what it is worth because of the mobile homes nearby. Animals are neglected at the park. His wife stated that they have smelled meth being cooked there.
- "In a couple of those (pictures) you will see it is high traffic on this road at certain times of day"... "And yes, I can say that I have put my house up for sale twice and was told by the real estate agent that because of the trailers next door and around in my area that the value of my real estate, I could not get what it would really be worth because it has depreciated" ... "There is a two and a half mile stretch from 17A to 78. It takes approximately twenty to twenty-two minutes to travel both ways or one way in heavy traffic time. We are posed with a major problem with the safety factor of those emergency vehicles going to and from. One person being trapped in a fire, losing one minute can cost him his life".
- Residents have been coming to the Planning Commission for years to protest applications to add more mobile homes, and the Planning Commission has consistently denied those applications.

- “From the four way stop to my house is probably 800 yards, roughly, and it backs up every day. And I’ve got video standing on my front porch where they’re stopped in the road waiting to get through.”
- “Traffic and everything on there around Sangaree School. You can’t get there in the afternoons or in the mornings for people dropping or picking up kids there. They even park in the highway. You got to sit there and wait for them to get through before you can get through that intersection there around the school. Y’all need to come around there in the afternoons and see what kind of traffic we got on the road.”
- “My concern is about traffic, safety and children”... “That’s a big concern right there.”... “It comes to a tipping point to where you know you got carrying capacity on the road. You got to look at the safety. And that’s the direction I’m coming from. Totally.” *Councilman Jack Schurlknight*. He also stated that he has been down Royle Road many times. He has seen a “lot of stuff” going on in the area. It does devalue the property.
- “I don’t hear anyone saying mobile homes are a bad thing because you live there. However, I do hear concerns about traffic and safety of the residents and children.” *Supervisor and Chairman of County Council William Peagler*.
- One resident stated that he had counted thirteen mobile home parks on Royle Road, containing 316 mobile homes. He also stated that eleven applications to add mobile homes had been denied since 2002. He stated that he had put his house up for sale twice but his real estate agent told him that he can’t get what the house is worth because of the mobile homes next to his property. He also complained about constant traffic and drug activity in the area. He complained about traffic safety, saying that he had seen someone hit by a car.
- One resident presented a petition signed by other neighbors opposing the application.

## ANALYSIS AND FINDINGS OF FACT

### A. Standard of Review

Though the parties emphasize different factors for consideration, they agree on the basic standards of review, which are well established: “Zoning is a legislative act which will not be interfered with by the courts unless there is a clear violation of citizen’s constitutional rights. In order to successfully assault a city’s zoning decision, a citizen must establish that the decision was arbitrary and capricious. *Byrd, et al. v. City of North Augusta*, 261 S.C. 591, 201 S.E.2d 744 (1974).” *Knowles v. City of Aiken*, 305 S.C. 219, 407 S.E.2d 639 (S.C. 1991). “The governing

bodies of municipalities clothed with authority to decide residential and industrial districts are better qualified by their knowledge of the situation to act upon those matters than are the courts, and their decisions will not be interfered with unless there is a plain violation of the constitutional rights of citizens.” *Harbit v. City of Charleston*, 382 S.C. 383, 675 S.E.2d 776 (S.C. Ct. App. 2009). “Courts cannot become city planners but can only correct injustices when they are clearly shown to result from municipal action.’ *Knowles v. City of Aiken*, 305 S.C. 219, 222, 407 S.E.2d 639, 642 (1991). ‘In order to successfully assault a city’s zoning decision, a citizen must establish that the decision was arbitrary and unreasonable.’ *Id.* at 224, 407 S.E.2d at 642. ‘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.’ *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4th Cir.1995) (quoting *Nectow v. Cambridge*, 277 U.S. 183, 187–88, 48 S.Ct. 447, 72 L.Ed. 842 (1928)).” *Dunes West Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 737 S.E.2d 601 (S.C. 2013). A legislative zoning decision should not be overturned so long as the decision is “fairly debatable.” *Rushing v. City of Greenville*, 265 S.C. 285, 217 S.E.2d 797 (1975). “[A] decision of a municipal zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion.” *Austin v. Board of Zoning Appeals*, 362 S.C. 29, 606 S.E.2d 209 (Ct. App. 2004).


The essential difference between the parties’ legal positions is that the County asserts that the Council’s March 27, 2017 vote on the Plaintiff’s request for rezoning is a rational legislative action of Berkeley County government to which the Court must yield, while the Plaintiff asserts that the County’s decision to deny rezoning is based upon nothing but unsupported, pejorative speculation that reduces the decision to an arbitrary and capricious decision, and that the decision conflicts with

the County's express legislative decision in its Comprehensive Plan. The Plaintiff asserts that the County's political decision to deny the rezoning application under these circumstances reduces the decision to an arbitrary and capricious action that conflicts with the County's fact-based, rational legislative expression on Plaintiff's parcel.

**B. Was Berkeley County's Action Arbitrary and Capricious Because it Was Based on Unsupported, Pejorative Speculation?**

Plaintiff contends that the decision of Berkeley County Council to deny his rezoning request was arbitrary and capricious or unreasonable because it was based on nothing but unsupported, pejorative speculation that renders its decision an arbitrary and capricious one. In support of his contention Plaintiff relies on and cites the cases of *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) and *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073 (2000) as well as *Purdy v. Moise*, 223 S.C. 298, 75 S.E.2d 605 (1953) and *Wyndham Enterprises, Inc. v. City of North Augusta*, 401 S.C. 144, 735 S.E.2d 659 (Ct. App. 2012), among others.

Defendants rely on what they contend to be well-settled South Carolina law that provides that rezoning decisions are presumptively valid, and a property owner bears the burden of proving otherwise. *Bear Enterprises v. County of Greenville*, 319 S.C. 137, 459 S.E.2d 883 (Ct. App. 1995). They contend that the decision not to rezone Plaintiff's property was at least fairly debatable, notwithstanding the intemperate and unsupported nature of some of the public comments in favor of the decision. In support of their position Defendants further cite *Lenardis v. City of Greenville*, 316 S.C. 471, 450 S.E.2d 597 (Ct. App. 1994) (propriety of city's decision in refusing to rezone property from office use to commercial use was not so unreasonable as to impair or destroy property owner's constitutional rights; owner bought property as speculative investment

with full knowledge of existing zoning and surrounding commercial development, and vast majority of surrounding property in city was residential); *Harbit v. City of Charleston*, 382 S.C. 383, 675 S.E.2d 776 (Ct. App. 2009), *as amended* (May 4, 2009) (City's denial of application to rezone property consisting of house on corner lot from residential to limited commercial use was fairly debatable and not so unreasonable as to impair or destroy property owner's constitutional rights, even though other similarly situated properties on one of two bordering streets were zoned for limited commercial use). Defendants further posit that to overcome the presumption of validity there must be an absence of any evidence supporting the legislative action of County Council. *Town of Scranton v. Willoughby*, 306 S.C. 421, 412 S.E.2d 424 (1991). In *Willoughby* the court noted that the zoning ordinance was enacted "for the purpose of promoting the health, safety, morals, and general welfare of the community." *Id.* at 422, 412 S.E.2d at 425. Defendants contend that is also the case here. 

Defendants also emphasize that Berkeley County Council has been vested with the following powers by state law:

All counties of the State, in addition to the powers conferred to their specific form of government, have authority to enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of these powers in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them. The powers of a county must be liberally construed in favor of the county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties. *S.C. Code Ann. § 4-9-25.*

With respect to its zoning ordinances, Defendants contend that Berkeley County Council must abide by the following statutory mandate:

(A) Zoning ordinances must be for the general purposes of guiding development in accordance with existing and future needs and promoting the public health,

safety, morals, convenience, order, appearance, prosperity, and general welfare.  
S.C. Code Ann. § 6-29-710.

Defendants further point out that Berkeley County has adopted a county-wide zoning ordinance. It is known as the Berkeley County Zoning and Development Standards Ordinance, ("Zoning Ordinance") effective August 28, 2001. All purposes of the Zoning Ordinance are stated in Article 1.2. Defendants argue that there are many stated purposes, which are not mutually exclusive. They cite the "Purpose and Authority" article, which reads as follows:

**ARTICLE 1. - PURPOSE AND AUTHORITY**

**1.1. - Authority.**

This ordinance is adopted pursuant to the statutory authority conferred by S.C. Code 1976, § 6-29-710 et seq., as amended.

**1.2. - Purpose.**

It is the purpose of this ordinance to:

- A. Implement the goals and policies outlined in the Berkeley County comprehensive plan;
- B. Provide for adequate light, air, and open space;
- C. Prevent the overcrowding of land, to avoid undue concentration of population, and to lessen congestion in the streets;
- D. Facilitate the creation of a convenient, attractive, and harmonious community; to protect and preserve scenic, historic, or ecologically sensitive areas;
- E. Regulate the density and distribution of populations and the uses of buildings, structures and land for trade, industry, residence, recreation, agriculture, forestry, conservation, airports and approaches thereto, water supply, sanitation, and public activities;
- F. Facilitate the adequate provision or availability of transportation, police and fire protection, water, sewage, schools, parks, and other recreational facilities, affordable housing, and disaster evacuation;
- G. Distribution of population and traffic that will tend to create conditions favorable to health, safety, convenience, appearance, prosperity, morals, order, and the general welfare of the county.

Defendants claim that the legislative actions of the Planning Commission, the Land Use & Economic Development Committee and the full County Council to retain the previously established R-2 zoning designation on the subject property are consistent with several of the purposes of the Zoning Ordinance.


Defendants also argue that it is significant that the matter before the court is not an appeal from the Board of Zoning Appeals, ("BZA"), which by county ordinance prescribes the duties and requirements of the BZA<sup>3</sup>. Defendants assert that the BZA is a quasi-judicial body not answerable to the voters. This court should distinguish the roles, functions and imperatives placed upon the BZA and that of County Council and the presumptions granted by law to the decisions of County Council. In other words, Defendants contend that County Council is not required, nor are individual members of Council required to announce the reasons for their decisions and actions in open session or in writing with associated findings and reasons. This court must, in Defendants' view, practice judicial restraint and not supplant its judgment for the local government's legislative judgment. *Lenardis, et al., supra.*

Defendants acknowledge that the County Planning staff here found that the requested rezoning was consistent with the Comprehensive Plan, but Defendants contend that the elected officials, possessed with their legislative authority, determined that staff's recommendation, although a proper consideration, was outweighed by other considerations rooted in public safety, health, and welfare, among other proper purposes. Defendants argue that the mere fact that the Planning Commission and the County Council reached a decision different from that


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<sup>3</sup> Berkeley County Zoning Ordinance 21.6. - Decisions of the board of zoning appeals. All final decisions and orders of the board must be in writing and be permanently filed as a public record. All findings of fact and conclusions of law must be separately stated in final decisions or orders of the board, which must be delivered to parties of interest by certified mail.

recommended by Planning staff does not render the final decision arbitrary and capricious. The decision was for the Council to make, after due deliberations and taking into account all of the facts. *Greb v. Bd. of Comm'rs for Klamath County*, 32 Or. App. 39, 573 P.2d 733 (1978) (each county governing body is required to retain responsibility for land use planning within its county, and is therefore vested with authority to make county land use decisions; county board of commissioners is not bound by recommendations of county planning commission even if supported by substantial evidence); *Adams v. City of Richmond*, 340 S.W.2d 204 (Ky. 1960) (zoning is vested by statute in the city legislative body, and it had power to override or reject a recommendation of the zoning commission which merely makes recommendations).

I agree that there is a distinction between judicial appellate review of an administrative decision and judicial scrutiny of a legislative decision. A legislative body is not expected to make an evidentiary record or to articulate the bases for its decisions as would stand up to judicial appellate review. Rather – as the above-cited caselaw holds – legislative actions must be upheld if there is even a fairly debatable basis to support them. 

I find that the Plaintiff made a compelling argument to the County in favor of his rezoning application and the Planning staff agreed with his argument. Plaintiff credibly promised to improve the overall character of the properties, which already contain mobile homes. The number of mobile homes that he proposed to add was very small compared to the number of mobile homes already on Royle Road. Plaintiff correctly pointed out that his proposal to increase availability of affordable housing was consistent with the County's Comprehensive Plan. On the other hand, not all of the reasons advanced in opposition to Plaintiff's application can be labeled unsupported, pejorative speculation. To be sure, some of the public comments made in opposition to Plaintiff's application were intemperate and unsupported by empirical evidence. Yet, legislative action or

inaction must not be judged by the least compelling arguments advanced to support it. Plaintiff himself told the Planning Commission that his proposed mobile home park would not be “trash” or a “thug park.” It would be unfair to judge the County’s legislative decision because of public comments – however pejorative, uninformed, and speculative – that were made in that same vein. Further, neighbors’ fears about increased housing density and its attendant aggravation of traffic congestion and increased burden on infrastructure are fairly debatable. Certainly Plaintiff’s proposed addition to these social problems would be minimal in comparison to the existing burdens. However, evidence in the record suggests that the residents of that area had for years consistently opposed more mobile homes and the County had consistently denied applications for them. Arguably the County would be hard-pressed to deny future similar rezoning applications if it granted Plaintiff’s application, so Council could reasonably believe that approving Plaintiff’s application would lead them down a slippery slope. 

My conclusion is best summarized by the following statement: “While the landowner here ... do[es] not embrace this choice of zoning, other residents in close proximity applaud this zoning. While the landowner may not agree and may be able to convince this Court not to agree with the City’s zoning choice, that is not the issue before [me]. [I] cannot insinuate [my] judgment into a review of the City’s decision. Rather, [I] must leave the City’s decision undisturbed if the propriety of that decision is even ‘fairly debatable.’ *Rushing v. City of Greenville*, 265 S.C. 285, 288, 217 S.E.2d 797, 799 (1975); *Hampton v. Richland County*, 292 S.C. 500, 503, 357 S.E.2d 463, 465 (Ct.App.1987), cert. denied, 296 S.C. 72, 370 S.E.2d 714 (1988).” *Knowles v. City of Aiken*, 305 S.C. 219, 407 S.E.2d 639 (S.C. 1991). Based on the foregoing considerations, I find that Plaintiff has not met his considerable burden of proving that the Defendants’ legislative action was arbitrary and capricious because it was based on factually unsupported, pejorative public opinion.

C. **Was Berkeley County's Action Arbitrary and Capricious Because it Violates the County's Comprehensive Plan?**

I find more troubling Plaintiff's argument that the County's refusal to rezone his property to R-3 is arbitrary and capricious because it conflicts with the County's legislatively-enacted Comprehensive Plan. Plaintiff argues here, as he did before the Planning Commission and before County Council, that his application should be approved because it supports the goals expressed in the Comprehensive Plan and was in fact specifically provided for in the Plan. The Planning Commission staff found this argument compelling and recommended approval of the application on this basis. Plaintiff argues that the Comprehensive Plan was the product of extensive study, public input, and legislative deliberation. The Plan was adopted by ordinance, so it is entitled to at least as much judicial deference as the legislative decision that Plaintiff now challenges. Plaintiff contends that Council's refusal to rezone his property was arbitrary, capricious, and unreasonable not only because it was based on unsupported and pejorative opposition by nearby residents, but because that opposition was contrary to law as embodied in the Comprehensive Plan. I found this argument sufficiently troubling that I asked the parties to brief specifically the question whether the Comprehensive Plan has the force of law.

By way of counter to Plaintiff's contention that the Comprehensive Plan has the force of law, Defendants argue that while the Comprehensive Plan is undeniably the creation and product of a lawful process, the plan itself is not law. Defendants call attention to the words of the Plan. Specifically, Defendants cite the Introduction, which states in pertinent part:

Since the passage of Berkeley County's 2004 Comprehensive Plan Update, continued growth and development has led to a changing set of issues, goals and needs for the jurisdiction. The 2010 Comprehensive Plan is a document intended to both identify the important positive attributes and components which continue to define Berkeley County, while *guiding* the growth and development of Berkeley County for the next fifteen to twenty years. It is, in essence, a new *blueprint* for the County's future.

(emphasis added). Defendants further reference the Purpose of the Plan, which states in pertinent part:

The purpose of the Plan is to provide a *snapshot* of where the County is currently, and to set forth *goals for future land use and development* with specific policies and *recommended strategies* for achieving these goals. The plan will *guide decision-makers when making decisions, policies and laws regarding the future development of land, provision of essential community facilities, and preservation of natural and cultural resources*. It is intended to generate local pride and enthusiasm about the future of the community, thereby ensuring that citizens are involved with the implementation of the Plan.

The *goals* in this Plan do not supersede those adopted by individual jurisdictions, however identifies areas where coordinated planning should be done on inter-jurisdictional issues that affect both the County and its municipalities.

The result is a concise, user-friendly document intended to operate in conjunction with adopted and amended zoning and land use regulations, in that issues identified in the Plan may be addressed through the development of suitable regulations and ordinances consistent with the *policies* identified in the Comprehensive Plan. The purpose of the 2010 Comprehensive Plan is to serve as a *mechanism for which future land use and development decisions can be made that will help shape the future of Berkeley County*.

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(emphasis added). Defendants also highlight the Vision of the Plan, which states in pertinent part:

Throughout the planning process, Planning Commission and citizen input has consistently come back to the same *basic ideas or principles* of how Berkeley County is envisioned. This includes concerns over issues such as rapid growth, adequate infrastructure and quality of life; and hopes such as better planning, more jobs and preservation.

Based on the information gathered, the following overall vision has been expressed and embraced:

Berkeley County is a vibrant community that embraces its history while promoting growth and development. The County will continue to promote sustainability and livability by implementing the following *five guiding principles* of the adopted comprehensive plan:

- Protect and promote distinctive, diverse communities;
- Manage infrastructure systems effectively and expand them efficiently;
- Respect and enhance historical and natural resources and expand their public accessibility;

- Make recreational opportunities--- both active and passive---available county-wide; and
- Draft a clear, fair plan to be implemented through simplified costs and streamlined processes.

(emphasis added).

Defendants also point to the Plan Implementation section of the Plan, which states in pertinent part:

*The Comprehensive Plan is part of an ongoing process... the policies in this Plan are intended to be building blocks for future planning efforts and land development decisions.*

(emphasis added).

Defendants further cite state law on the subject of a comprehensive plan. They claim that a plan is intended to be a guide to decision-makers. They call specific attention to Title 6, Chapter 7 of the South Carolina Code of Laws, under the heading *Planning by Local Governments* which provides as follows:

The intent of this chapter is to enable municipalities and counties acting individually or in concert to preserve and enhance their present advantages, to overcome their present handicaps, and to prevent or minimize such future problems as may be foreseen. To accomplish this intent local governments are *encouraged to plan for future development*; to prepare, adopt, and from time to time revise, a *comprehensive plan to guide future local development*; and to participate in a regional planning organization to coordinate local planning and development with that of the surrounding region. As aids in the implementation of the comprehensive plan local governments are encouraged to adopt and enforce appropriate land use controls, and cooperate with other governmental authorities. (emphasis added).

The provisions of this chapter are declared to be necessary for the promotion, protection, and improvement of the public health, safety, comfort, good order, appearance, convenience, prosperity, morals, and general welfare.

Any county or municipality may, but shall not be required to, exercise any of the powers granted by this chapter. Whenever such a governing authority shall elect to exercise any of the powers granted by this chapter, such powers shall be exercised in the manner hereinafter prescribed. *S.C. Code Ann. § 6-7-10. Declaration of Purpose.*

(emphasis added).

Within Title 6, Chapter 29 of the South Carolina Code of Laws, *The South Carolina Local Government Comprehensive Planning Enabling Act of 1994* are found the following:

(A) The local planning commission shall develop and maintain a planning process which will result in the systematic preparation and continual re-evaluation and updating of those elements considered critical, necessary, and desirable *to guide the development and redevelopment of its area of jurisdiction. S.C. Code Ann. § 6-29-510. Planning process; elements; comprehensive plan.* (emphasis added).

and

(A) Zoning ordinances must be for the general purposes of *guiding development* in accordance with existing and future needs and promoting the *public health, safety, morals, convenience, order, appearance, prosperity, and general welfare.* To these ends, zoning ordinances must be made with reasonable consideration of the following purposes, where applicable:

- (1) to provide for adequate light, air, and open space;
- (2) to prevent the overcrowding of land, to avoid undue concentration of population, and to lessen congestion in the streets;
- (3) to facilitate the creation of a convenient, attractive, and harmonious community;
- (4) to protect and preserve scenic, historic, or ecologically sensitive areas;
- (5) to regulate the density and distribution of populations and the uses of buildings, structures and land for trade, industry, residence, recreation, agriculture, forestry, conservation, airports and approaches thereto, water supply, sanitation, protection against floods, public activities, and other purposes;
- (6) to facilitate the adequate provision or availability of transportation, police and fire protection, water, sewage, schools, parks, and other recreational facilities, affordable housing, disaster evacuation, and other public services and requirements. "Other public requirements" which the local governing body intends to address by a particular ordinance or action must be specified in the preamble or some other part of the ordinance or action;
- (7) to secure safety from fire, flood, and other dangers; and
- (8) to further the public welfare in any other regard specified by a local governing body.

*S.C. Code Ann. §6-29-710* (emphasis added).

Not all of the text cited above is relevant to the inquiry here. Some of the cited subjective, aspirational language appears to be explanation of the considerations that went into the development of the Plan, not what the Plan would mean after it was legislatively adopted. Nevertheless, nothing in the Comprehensive Plan suggests that it was intended to supplant the County's zoning ordinance or preempt the legislative zoning authority vested in County Council. The Plan includes five "Guiding Principles", each of which is supported by various "Goals and Policies." The First Guiding Principle is, "Berkeley County will protect and promote the existence of distinctive and diverse, sustainable communities within its boundaries." In adopting the Plan, County Council did not declare that the Future Land Use Map would dictate all future zoning classifications. In fact, the Plan states (at p. 10) that "A summary of modifications proposed for the adopted Future Land Use Map is provided on subsequent pages, followed by a Future Land Use Map that has been revised *to illustrate these modifications* and is proposed for adoption." (Emphasis added).

The South Carolina Local Government Comprehensive Planning Enabling Act of 1994 requires counties to follow specific procedures when they propose to build infrastructure that conflicts with their comprehensive plans. The statute requires any new structure, use or project be compatible with the adopted plan. Any proposal found to be in conflict with the plan must undergo an intensive statutory process to include required comments and findings by the Planning Commission prior to approval. S.C. Code Ann. § 6-29-540. This process applies to county infrastructure improvements. No such provision exists with regard to zoning decisions for private property, either in state law or under Berkeley County ordinances. This omission strongly suggests that the Comprehensive Plan is not intended to dictate the County's zoning decisions for private property.

The Comprehensive Plan does have the force of law, since it was formally adopted by Ordinance. Nevertheless, nothing in the Plan suggests that it was intended to dictate future zoning classifications for specific parcels of property. Indeed, the Plan itself is subject to review and revision every five years, so it cannot have been intended to decide all future zoning questions. That the Plaintiff's application to rezone his property was consistent with the Comprehensive Plan is certainly a strong point in his favor. However, it is not enough to overcome his extremely high burden of proving that the merits of Council's legislative decision are not at least fairly debatable.

### CONCLUSIONS OF LAW

I conclude as a matter of law as follows:

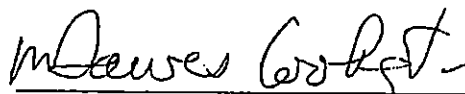
1. This court has jurisdiction over the parties and the subject matter;
2. Venue is proper;
3. Plaintiff has failed to meet his burden of proving that the legislative decision of County Council in denying his rezoning request was arbitrary and capricious or unreasonable;
4. While members of County Council are not required to announce the reasons for their votes, and the standards applicable to a vote by County Council are not governed by the same requirements as the BZA, there is sufficient evidence in the record of expressed concerns by members of Council about traffic, safety, and quality of life which are legitimate and statutorily sanctioned legislative considerations;
5. While there are statements in the record made by members of the public in open session which were highly charged and emotionally based, there is no evidence in the record suggesting that Council adopted, embraced, approved, or sanctioned those comments or that the comments formed a basis for its vote;

6. There are statements in the record by members of the public in open session which are based on their personal observations and experiences and are directed to traffic, safety and quality of life concerns;
7. The Comprehensive Plan, while legislatively adopted, does not supplant the County zoning ordinances or preempt County Council's future legislative zoning decisions;
8. The matter before County Council was fairly debatable and was fairly debated;
9. County Council's decision to deny Plaintiff's rezoning request was and is a proper exercise of its legislative prerogative;
10. The legislative decision by public vote of County Council should not be upset or set aside; and
11. The parties have agreed that the Plaintiff's constitutional arguments are not before the undersigned for decision. Accordingly, I make no findings as to any constitutional issue, unless and except to the extent that constitutional issues are necessarily implicated in finding that County Council's legislative decision was not arbitrary or capricious.

*MJC*

**ORDER**

Based on the record before me, which is ample, complete and proper, and the arguments of counsel, it is ordered, adjudged and decreed that Plaintiff's appeal, be and the same hereby is DENIED; provided, however, that I make no ruling on Plaintiff's constitutional claims except as stated above.

  
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**M. DAWES COOKE, JR.**  
Special Referee

May 5, 2020