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SC Court of Appeals

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.

ORDER ON MOTION FOR RECONSIDERATION

FILED

JUL 23 2020

CASE_____ NO_____
LEAH GUERRY DUPREE
CLERK OF COURT
BERKELEY COUNTY, SC

This matter is before the Undersigned on Plaintiff's motion pursuant to South Carolina Rules of Civil Procedure 59 and 60 for reconsideration of its Order entered on May 12, 2020. In that Order the Undersigned, sitting as Special Referee, denied Plaintiff's appeal from the Defendant's refusal to rezone a 1.1-acre parcel of property at 751 Royle Road from R-2 (residential mobile home) to R-3 (commercial mobile home). I have carefully reviewed Plaintiff's motion, Defendant's memorandum in opposition to the motion, Plaintiff's reply to Defendant's opposition, and my original Order. I heard argument on July 10, 2020. For the reasons that follow I must deny Plaintiff's motion.

First, I agree with Plaintiff's logical arguments.[1] As I read the caselaw, in the zoning context arbitrary and capricious (or arbitrary and unreasonable as some decisions put it) means the same thing as not fairly debatable. In fact, the *modus tollens* syllogism works both ways because fairly debatable and not arbitrary and capricious mean the same thing when referring to judicial review of zoning legislation. Arbitrary and capricious, arbitrary and unreasonable, and not fairly debatable all mean the same thing in this context.

[1] I am heartened, though not surprised, that counsel knows the proper use of the oft-misused term, "begging the question."

"In order to successfully assault a city's zoning decision, a citizen must establish that the decision was arbitrary and unreasonable." *Knowles v. City of Aiken*, 305 S.C. at 224, 407 S.E.2d at 642. "The burden of proving the invalidity of a zoning ordinance is on the party attacking it, and it is incumbent on respondent to show the arbitrary and capricious character of the ordinance through clear and convincing evidence." *Town of Scranton v. Willoughby*, 412 S.E.2d 424, 306 S.C. 421 (S.C. 1991) (per curiam). "The Court will not overturn the action of the City if the decision is fairly debatable because the City's action is presumed to have been a valid exercise of power and it is not the prerogative of the Court to pass upon the wisdom of the decision." *Rushing v. City of Greenville*, 265 S.C. 285, 217 S.E.2d 797 (S.C. 1975). Judicial review of a legislative decision – e.g., a request to alter a zoning classification – differs from review of a quasi-judicial decision – e.g., granting a variance – in that a legislative body is not required to take evidence or deliberate in a particular way, whereas an administrative body is expected to make evidence-based decisions in accordance with applicable statutory or regulatory standards. "An ordinance rezoning a particular piece of property, like an ordinance adopting a comprehensive zoning plan, is legislation, pure and simple. As such, it is entitled to the presumption of legislative validity. . . . Furthermore, to view the act of rezoning a single tract as a quasi-judicial act . . . would only invite countless challenges, many of which must proceed to the courts for a dispositive adjudication." *Hampton v. Richland County*, 292 S.C. 500, 357 S.E.2d 463 (S.C. App. 1986).

Plaintiff makes a valid point that everything is debatable, and the dispositive question is whether the County Council's decision is *fairly* debatable. Plaintiff's well-articulated frustration in this case, wherein his rezoning request was consistent with the County's Comprehensive Plan and endorsed by the County's planning staff, is reminiscent of Justice Hearn's exasperation in *Historic Charleston Found. v. City of Charleston*, 400 S.C. 181, 734 S.E.2d 306 (S.C. 2012):

"Thus, while it may be fairly debatable whether a large building is necessary for the continued development of Upper King, it is clear that a 105–foot building on this site would not be in accord with the Plan's requirement of deference to historical structures and respect for the skyline. I certainly am mindful of our role as a court and the admonition that we not become city planners, as well as the high burden a challenger must meet. In purporting to find the ordinance lawful even if it is spot zoning, the majority hides behind this standard and simply writes that we must 'keep [ ] in mind the particular circumstances of the case.' Yet this is exactly what the majority avoids doing, opting instead to allow the City to blatantly ignore its own duly adopted plan." But Justice Hearn wrote in dissent and the majority of the Court found that the City had acted within its rights albeit contrary to its comprehensive plan.

To be sure, substantial evidence supported Plaintiff's application to re-zone 751 Royle Road and some of the reasons that citizens advanced in opposition to the request were canards. However, as I stated in my original Order it would be unfair to judge a legislative decision by the least persuasive arguments advanced in support of it. Some of those who spoke against the measure expressed genuine and rational concerns about the negative effects that rezoning the property would have. Councilman Jack Schurlknight said, "My concern is about traffic, safety and children".... "That's a big concern right there." He also said, "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." Council Chairman William Peagler said, "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." Considering the record as a whole, I am compelled to conclude that it is at least fairly debatable whether increasing the density of mobile

homes on Plaintiff's parcel would increase traffic congestion, endanger children, or lower property values -- particularly if this became a precedent for future similar requests in that area.

With sincere respect for Mr. Olds and the arguments of his able counsel, for the reasons stated above I must deny the motion for reconsideration.

M. DAWES COOKE, JR.
Special Referee

July 22, 2020