THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

M. Dawes Cooke, Special Referee

Case No. 2017-CP-08-01088

Appellate Tracking Number 2020-001118

Todd Olds, Appellant

vs.

Berkeley County, Berkeley County Planning Commission, Respondent.

INITIAL REPLY BRIEF OF APPELLANT

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REPLY TO RESPONDENT'S STATEMENT OF CASE

The Respondent erroneously mischaracterizes the situation on the ground by overstating the number of presently existing homes, and this inadvertent mischaracterization leads to confusion. The Respondent is correct: Appellant owns two adjoining parcels on Royle Road. They are known as 749 and 751 Royle Road, and they share a boundary. However, at the present time, there is only one mobile home on the R-3 lot and two on the R-2 lot that is the subject of this action (See R.O.A. at page __ for a map [Exhibit 2]). What the Respondent meant to say is that under the **current** zoning, Berkeley County allows up to 11 mobile homes on the R-3 lot because each home requires a minimum of 4,000 square feet in addition to extra setbacks and buffers. This dispute arose when Appellant sought to have his R-2 lot rezoned to conform to his adjoining R-3 lot, and the case becomes less confusing when these facts are properly summarized. The following matrix lays out the combinations:

	AS IS	**AS ALLOWED UNDER CURRENT ZONING**	**AS REQUESTED (OR AS ALLOWED UNDER 2015 COMP. PLAN LAND USE)**
749 Royle R-3	1 home	11 homes	11 homes
751 Royle R-2	2 homes	2 homes	11-13 homes
TOTAL	3 homes	13 homes	22-24 homes

Therefore, at the time of the Appellant's application and today, there were, and are, only 3 mobile homes on the two lots. The legal issue of compatible zoning comes into sharper focus with this corrected identification of the facts and distills the dispute down to a simple question of whether it makes sense for a property owner with two contiguous parcels to be zoned differently

or whether they should be uniformly zoned consistently with the County's "legislative decision" as expressed through its adopted Comprehensive Plan.

The remainder of Respondent's "Statement of Case" is a repetition of the complaints of the Royle Road neighbors, which will be addressed in Reply Argument 2.

REPLY ARGUMENT 1

THE COUNTY'S "LEGISLATIVE DECISION" IS EXPRESSED THROUGH ITS COMPREHENSIVE PLAN, AND ZONING IS A STATUTORY PROVISION INTENDED TO "IMPLEMENT" THE COMPREHENSIVE PLAN, WHICH SUPPORTS THE APPELLANT'S APPLICATION FOR REZONING.

The Respondent cites a general principle of law with which the Appellant agrees; to wit, that legislative acts are entitled to deference by the courts. Here, the Respondent argues the Court must exhibit "deference" to the County's decision on Appellant's zoning request while simultaneously ignoring the County's "legislative decision" expressed in its Comprehensive Plan. Deference, of course, never means either obsequiousness or inconsistency, and courts have never hesitated to strike down legislative decisions that are based on mere speculation and prejudice, which is, as set forth in Appellant's initial brief, the definition of "arbitrary" and "capricious." More importantly, the Respondent asserts an inconsistent position: on the one hand that this Court has no business second guessing County Council decisions, while on the other hand avoiding any acknowledgment of the County's legislative decision expressed through enacting its Comprehensive Plan. See Berkeley County Ordinance 1.2: "It is the purpose of this Zoning Ordinance to: Implement the goals and policies outlined in the Berkeley County Comprehensive Plan." (R.O.A. page ____) The force and import of the Comprehensive Plan demonstrates why Respondent's reliance on cases such as *Harbit v. City of Charleston*, 382 S.C. 383, 675 S.E.2d 776 (Ct. App. 2009) is so misplaced. As discussed in more detail in Appellant's Initial Brief at page

19, Harbit was swimming against the current in seeking a rezoning that was at variance with the City's goals in its Comprehensive Plan (Ashley River Overlay Zone), which the Court of Appeals noted this way: "the City proffered several **reasonable** grounds" why Harbit's application was not consistent with the City's Ashley River Overlay District Plan. (emphasis added) In other words, unlike the Appellant, Harbit's application was in contravention of the Comprehensive Plan while Appellant's is a request to comply and conform to the Comprehensive Plan. Here, and this is a fact the Respondent avoids like a third rail, there are two legislative decisions being examined in this case: 1), the county's Comprehensive Plan adopted after years of careful study, consultation, and frequent public hearing participation vs. 2), a non-compliant zoning decision reached without study or analysis based on "stuff" to appease a group of complaining neighbors. So, when the Respondent argues on page 12 of its brief that "zoning and rezoning is up to the local legislative body," (Respondent's brief on page 12, citing *Bear Enterprises v. Greenville County*, 319 S.C. 137, 459 S.E.2d 883 (1995)), the Appellant agrees. However, in this case, it is the Respondent who is acting at variance with its Plan, and it is the County—not the Appellant—who misapplies the zoning code, which identifies its function to "implement" the County's Comprehensive Plan. This is the County's legislative decision that requires deference. The generic concerns expressed by the complaining neighbors: traffic, safety, density, are unsupported by any objective criteria, and include concerns evaluated by the County in enacting its Comprehensive Plan. The complaining neighbors identified nothing more than their subjective and prejudicial concerns, and the lower court erred in promoting their speculative and unsupported concerns over the careful analysis evaluated and formulated in the expression of the Council's legislative decision called the Comprehensive Plan. It is demonstrable error to conclude otherwise. The Comprehensive Plan is a not a legislative decision that can be ignored to mollify a few

unhappy neighbors. The Enabling Act intends to place a duty on the Planning Commission—importantly, an appointed body of public officials—by requiring that non-political body to affirm and recommend to Council a Comprehensive Plan to be presented to the governing body for adoption. Only after a recommendation by this nonpolitical body may Council adopt a Comprehensive Plan. Our Supreme Court emphasized the General Assembly's intent that careful and rational land use decisions be made as free as possible from the push and pull of political advocacy: "Similarly, the comprehensive and detailed nature of the Title 6 provisions briefly outlined above reveals out Legislature's intent that zoning decisions should be made by a cross-section of unbiased officials after careful deliberation." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 576 S.E.2d 716 (2000)

The zoning decision reached by a "cross section of unbiased officials after careful deliberation" is expressed through the duly enacted Berkeley County Comprehensive Plan, including the Future Land Use Map. The General Assembly leaves no doubt about the relationship between the Comprehensive Plan and zoning ordinances:

> (A) When the local planning commission has prepared and recommended and the governing body has adopted at least the land use element of the comprehensive plan as set forth in this chapter, the governing body of a municipality or county may adopt a zoning ordinance **to help implement the comprehensive plan**.
>
> § 6-29-720(A), S. C. Code, Ann. (emphasis added)

Similarly, the Berkeley County zoning ordinances, § 1-2, R.O.A. page ___, themselves emphasize that zoning decisions must "implement" the Comprehensive Plan. This is the only rational use of zoning, which the legislature intended to be careful, deliberative, and free from "undue political influence." *I'On, L.L.C. v. Town of Mt. Pleasant, op cit*. Yet here, bias and influence won the day when the County Council ignored its carefully enacted "legislative decision" and failed to

"implement" the carefully deliberated strategies of the Comprehensive Plan without a reasonable justification for doing so.

According to the Comprehensive Plan, the Future Land Use Map, and the recommendation of the Planning Department staff, the Appellant's parcel is properly rezoned to R-3, not only to conform to the plan, but also to match up with the zoning on the adjoining parcel and to be compatible with the character of the neighborhood. As the Record demonstrates, Appellant's R-2 parcel is bordered by R-3 to the North (Appellant's parcel), R-2 to the South and East, and OI (Office/Industrial) to the West (R.O.A. page ____), but the R-2 parcels nearby are all being utilized as legal non-conforming mobile home parks. In other words, the neighboring R-2 parcels might be zoned R-2, but they are being used as R-3. The two parcels to the South and East are R-2, but they are both currently utilized as "Commercial/Mobile Home Park." (R.O.A. page ___ [Exhibit 3, page 2]).

Appellant understands why the Respondent avoids discussion of the Comprehensive Plan because it dissolves Respondent's argument. By statute, the Comprehensive Plans carries the force of law, and deviation from a Comprehensive Plan requires a rigorous statutory process for applications that propose to deviate from Plan. See § 6-29-540, S. C. Code, Ann. which requires any application in conflict with the Comprehensive Plan to: (1) appear before the Planning Commission, (2) advertise and publicize the intent to construct at variance with the Plan, and (3) secure Planning Commission approval. When asked to evaluate the effect of the Comprehensive Plan on zoning ordinances, the Supreme Court made clear that both the primacy of the Comprehensive Plan and that fact that zoning exists to **implement** the requirements of the Plan are the controlling factors. (See Berkeley County Ordinance 1-2 quoted above on page 5.) In *Sinkler v. Charleston County*, 387 S.C. 67, 690 S.E.2d 777 (2010), when a property owner sought

rezoning from AG-15 to Planned Unit Development outside the parameters of the County's Comprehensive Plan, the Supreme Court said:

> The Enabling Act permits the governing body of a county to adopt zoning ordinances to help implement a Comprehensive Plan. S. C. Code 6-29 720 (2004 and Supp. 2009). Then Charleston County Council enacted the Charleston County Zoning and Land Development Regulations (the ZLDR) in 2001 to implement its Comprehensive Plan.

The landowner in *Sinkler* asked for and received a rezoning of his parcel, which the circuit court reversed because it was inconsistent with the Comprehensive Plan. The Court of Appeals reversed the trial court, and the Supreme Court reversed the Court of Appeals because the landowner's application failed to contain the enabling Comprehensive Plan's requirement for "mixed uses":

> Respondents alternatively asserted that they did not have to meet the parameters of a PD under the Enabling Act because County Council was free to employ other zoning techniques, citing the prefatory language of section 6-29-720(C) governing zoning methods, which allows County Council to use one of the enumerated techniques or other techniques. We agree with the circuit court that County Council clearly chose to employ the PD process for the Walpoles' property and, once having invoked that technique, it could not arbitrarily fail to meet the requirements for a PD. Consequently, we hold the circuit court correctly ruled the ordinance is invalid because it did not properly establish a PD as contemplated by the terms of the Enabling Act, and we reverse the Court of Appeals' determination on this point.

As *Sinkler* makes clear, the legislature intended that the County's Comprehensive Plan have practical application and force of law, and Respondent would implement the plan through its adopted zoning code. Therefore, it is implausible that the legislature intended Berkeley County can make legislative decision expressed in its Plan and then ignore its data-driven Comprehensive Plan, relying entirely on anecdotal "evidence" for contrary, non-compliant zoning decisions. (While not controlling on the issue before the Court, it does warrant mention that the only two lawyers on County Council both appreciated and articulated that they were voting to support the

rezoning precisely because the application met the goals and conclusions of the Comprehensive Plan. One of them also mentioned that as a young lawyer starting out on his career, his family relied on the affordability of a mobile home to provide housing. See Record on Appeal page ____[tr. March 27, 2017, Page 56-57])

In reversing the Court of Appeals, the Supreme Court rejected the identical argument Berkeley County asserts here; to wit, that County Council has the discretion to reach a particular zoning decision that is at variance with its findings and conclusions of its Comprehensive Plan. This brings us back to *Harbit*, and why that case supports the Appellant because in *Harbit*, as the landowner was arguing **against** the legislative decision expressed in the Ashely River Overlay Zone, where here, the County is arguing **against** its own Comprehensive Plan, and the Appellant is arguing **for** the Comprehensive Plan. When comparing *Harbit* to the present case, it is logically impossible for two landowners to be on opposite sides of the same issue and both be wrong! In short, in order to provide "deference" to the legislative prerogative of Berkeley County on this record, the Court must ignore the legislative decision expressed through the Comprehensive Plan. To do this, the Court must elevate the unreasoned and unsupported opinions of unhappy neighbors and promote them as sufficient to overrule the County's legislative decision expressed through the objective, carefully calculated and vetted conclusions of the Comprehensive Plan.

In a 2009 case, *Mikell v. County of Charleston*, decided the year before *Sinkler*, the Supreme Court also weighed the force of a Comprehensive Plan against a specific zoning decision, and laid the groundwork for its emphasis in *Sinkler* that the Comprehensive Plan controls. The Respondent here adopts Justice Cooper's reasoning in *Mikell v. County of Charleston*, 386 S.C. 153, 687 S.E.2d 326 (2009) that a County Council is more or less free to act any way it sees fit so

long as its action does not fatally offend constitutionally guaranteed minimums. This is the same conclusion reached by the Special Referee in this case; to wit, that despite the Appellant making an application consistent with the County's Comprehensive Plan, it just is not appropriate for a court to interfere in a County Council decision no matter how incongruent. Period. This was the conclusion expressed by Justice Cooper in his dissent in which the four judge majority, expressed by Justice Waller, held the opposite; that Charleston County could **not** deviate from its Comprehensive Plan:

> Petitioners instituted this declaratory judgment action, contending the ordinance conflicted with County's Comprehensive Plan and the ZLDR [Zoning and Land Development Regulations]. Petitioners' motion for summary judgment was granted by the Master. The Master held Ordinance # 1300 conflicted with the clear, unambiguous requirements of § 4.5.3(B) of the ZLDR limiting the density in an AG-10 district to a maximum of one dwelling per five acres. The Master found § 4.5.3 was, at best, inconsistent with § 3.5.7 of the ZLDR, such that the more specific regulation, § 4.5.3, controlled.
>
> The Court of Appeals reversed. *Mikell v. County of Charleston*, 375 S.C. 552, 654 S.E.2d 92 (Ct. App. 2007). It held County Council's decision to allow the PD was at least fairly debatable, and was neither arbitrary nor unreasonable. It found § 3.5.2 and § 3.5.7 of the ZLDR authorized County's exercise of discretion in approving a PD with a higher density than base zoning districts would have allowed. The Court of Appeals found no conflict existed between §§ 3.5.2, 3.5.7 and § 4.5.3(B). We reverse.

The reason the Supreme Court reversed the Court of Appeals and reinstated summary judgement was because, consistent with its decision in *Sinkler*, the zoning application to increase density in *Mikell* conflicted with the Comprehensive Plan. Here, the Appellant's application seeks to bring his property into conformity with the Comprehensive Plan. In *Mikell*, the Supreme Court pointed out that the question on appeal was not a dispute over facts—and neither is the dispute here—but rather a dispute over the meaning and application of the County's Comprehensive Plan as it applied to the application before it. The Supreme Court pointed out appellate review in such cases is different, "broader," because it involves a question of law, not fact:

Although great deference is accorded the decisions of those charged with interpreting and applying local zoning ordinances, "a broader and more independent review is permitted when the issue concerns the construction of an ordinance." *Id.* at 568, 666 S.E.2d at 894 citing *Charleston County Parks & Recreation Comm'n. v. Somers*, 319 S.C. 65,67, 459 S.E.2d 841, 843 (1995). The determination of legislative intent is a matter of law. *Id*

Applying this "broader and more independent review" resulted in the Supreme Court's decision that it had to reinstate the Master-in-Equity's grant of summary judgment because the application for rezoning was in conflict with the Comprehensive Plan. The same reasoning applies with equal force here because, as pointed out several times, the purpose of the Berkeley County Zoning Ordinances is to "implement" the Comprehensive Plan. See Berkeley County Ordnance 1-2, R.O.A. page ____

Finally, the Respondent asserts that Appellant confuses some standard between quasi-judicial decisions of the Board of Zoning Appeals and legislative decisions of County Council. (The failure of "evidence" on which the Council decided the issue is discussed below in Reply Argument 2.) Appellant agrees County Councils are not quasi-judicial bodies. This concession does not authorize Councils to be arbitrary. The casebooks overflow with legal decisions overturning government action for a myriad of reasons. In 1967, the U.S. Supreme Court handed down *Loving v. Virginia*, 388 U.S. 1, 875 S.Ct. 1817 (1967), and 40 years later law students still experience anguish that a democratic government could be so gratuitously cruel. The point is that both the Virginia General Assembly and the Virginia Supreme Court thought criminalizing racially mixed marriages was both "fairly debatable" and proper expressions of a "legislative decision" that demanded judicial deference. The lesson of *Loving* and the 18,000 cases citing it is that we are lucky to have a judicial branch where arbitrary "legislative decisions" can be examined in a non-partisan forum. Recent events have emphasized the importance of the judicial branch. The point is that it is a hard sell for any lawyer, and Respondent's lawyers are bright and shining

examples radiating the best tradition of the Bar, to assert that the courts of this nation are potted plants not permitted to examine arbitrary government action. Yet, this "hand's off" conclusion is the conclusion reached by the trial court, and it is an error of law.

REPLY ARGUMENT 2
FOR A DECISION TO BE "FAIRLY DEBATABLE," IT MUST BE SUPPORTED BY SOMETHING MORE THAN MERE CONJECTURE.

The Respondent's second argument is the heart of the case. The Respondent asserts in both arguments that this Court must keep its hands off the decision below because there is sufficient evidence to support the lower court's finding that the issue is "fairly debatable."

A.
Fairly Debatable

As legal standards go, "fairly debatable" is a low standard. This is because: (1) courts traditionally avoid second guessing legislative decisions to avoid offending the separation of powers, and (2) courts, like well-behaved children, do not speak unless spoken to:

> South Carolina is an "exception state." This means the South Carolina Supreme Court and this court are "confined to a disposition of appeals upon the exceptions taken. . . ." *Mishoe v. Atlantic Coast Line R. Co.*, 186 S.C. 402, 197 S.E. 97, 106 (1938); *Evans v. Bruce*, 245 S.C. 42, 138 S.E. (2d) 643 (1964); *Bartles v. Livingston*, S.C. 319 S.E. (2d) 707 (S.C. App. 1984); *Ellison v. Heritage Dodge, Inc.*, S.C. 320 S.E. (2d) 716 (S.C. App. 1984). More simply put, appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.
>
> *Langley v. Boyter*, 284 S.C. 162, 325 S.E.2d 550 (1984) (The Supreme Court quashed this decision, abrogating contributory negligence, at 286 S.C. 85, 332 S.E.2d 100 (1985) on the ground that the appellant lacked authority to argue against precedent.)

As the record demonstrates, there is no "evidence" for denying Appellant's application unless the court degrades the definition of "evidence" to mere "speculation." When faced with what weight to give to complaining neighbors asserting unsupported allegations, the appellate courts have been unanimous in rejecting such unsupported opinions. *Bannum v. City of Columbia*,

335 S.C. 302, 516 S.E.2d 39 (1999); *Wyndham Enterp. v. City of N. Augusta*, 401 S.C. 144, 735 S.E.2d 659 (Ct. App. 2012); *Helicopter Solutions v. Hinde*, 414 S.C. 1, 776 S.E.2d 753 (Ct. App. 2015) As these three cases make clear, complaining neighbors must identify something more than prejudice and speculation on which to ground land use decisions. (See *I'On v. Town of Mt. Pleasant, op. cit*. quoted on page 13.) The quality of such testimony appears often in public forums concerning land use. The history of zoning teaches us that the function of zoning is to segregate populations. See Richard Rothstein, *The Color of Law*, (W. W. Norton, 2017). Before zoning, courts across the land were called upon to enforce restrictive covenants to prevent property sales to unpopular groups: "As early as the 19th Century, deeds in Brookline, Massachusetts, forbade resale of property to 'any negro or native of Ireland.'" Rothstein, *The Color of Law*, page 78. Even after the Supreme Court declared such restrictions unenforceable (but not illegal) in 1948, in *Shelley v. Kramer*, 348 U.S. 1, 68 S.Ct. 836 (1948), three of the justices had to step aside because their property was subject to racial restrictions. The point—and it is a significant one—is that the soul of zoning in America was forged upon the smithy of prejudice, and the undercurrent of prejudice continues right through to the present day in the comments of the Royle Road residents. There is something about zoning that arouses the passion of citizens and liberates them to exhibit the raw prejudice demonstrated here. Writing for the Supreme Court of South Carolina in 2000, Justice Waller diplomatically commented on this phenomenon in *I'On v. Town of Mt. Pleasant*: 338 S.C. 406, 576 S.E.2d 716 (2000):

> In municipal government, few issues generate as much public interest as the control of land-use development. Zoning ordinances touch people where they live. Sensitive to the intense public interest in local land-use development, the Legislature has developed an orderly structure for public participation in the process. That process also contemplates the rational development of land use, free from undue political influence.

It is the tension between "intense public interest" on the one hand and "rational development of land use, free from undue political influence" on the other hand that is the heart of the present case, and it is insignificant that the decision here is "legislative" as opposed to "quasi-judicial." It is legally insufficient to deny Appellant the right to use his property to its highest and best use because the decision is "fairly debatable." Property rights are more substantial than such gossamer. The "fairly debatable" standard not one that is defined by the number of debaters; otherwise, it is like asking two wolves and a lamb to vote on what is for lunch. (Benjamin Franklin) When the issue is property rights, especially where as here—unlike every case cited by the Respondent—the Appellant seeks only a zoning change to "implement" the County's carefully calibrated legislative decision. In logic, law, and philosophy, anything and everything is "fairly debatable," and courts have never conditioned fundamental property rights on whether the highest and best use is "fairly debatable." As the Respondent correctly notes on page 15 of its brief, a landowner is not entitled to demand zoning to generate a "more profitable" use of his property. If that straw man were Appellant's assertion, he would deserve to lose. At the risk of being maddeningly repetitive, the issue here is that Appellant's contention is that his property should be rezoned to **conform** to the County's legislative decision reached in its publicly noticed and duly adopted Comprehensive Plan. The Comprehensive Plan is a legislative decision that deserves deference, but the lower court errs in elevating the County's expedient decision taken to mollify complaining neighbors as a decision that is unreviewable while simultaneously ignoring the legislative decision reached through its Comprehensive Plan. Interestingly, this fairly debatable argument is similar to the argument the Supreme Court of South Carolina grounded its decision upon in upholding the Beachfront Management Act's regulations on two lots on Isle of Palms. In *Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886 (1992), the South Carolina Supreme

Court found that Lucas could do lots of things with his property—just not what he wanted to do. That is the County's argument here: Appellant can have two mobile homes, but no more. However, the U. S. Supreme Court reversed because it found that the Beachfront Management Act curtailed so much of Lucas' use through regulation that it deprived him of meaningful economic use of his property. That analysis has applicability here, because: (1) the Appellant's request is to conform to the County's Plan, which is its legislative decision, (2) the entire area is being used as mobile home parks even though they are zoned R-2, making Appellant's property unfit for any use but that use compatible with the neighborhood, and (3) the Appellant's adjoining parcel is already zoned R-3 and it is illogical to divide zoning on commonly owned parcels. Rather, the test, as set forth fully in Appellant's initial brief at pages 10 - 18 is whether government's denial is either rational on one hand or arbitrary and capricious on the other, and since the County expressed its rational conclusion after years of careful study, it is error to conclude that the County's legislative decision reached in its Comprehensive Plan is entitled to no legislative deference while an *ad hoc* decision to mollify neighbors is unreviewable because it is a legislative decision. Since the Order under review found that a decision that is "not fairly debatable" is equivalent to arbitrary or capricious, a conclusion not challenged on appeal, the issue is whether the County's turning its back on its own Comprehensive Plan to mollify complaining neighbors is arbitrary or capricious.

B.
The lack of evidence

Since the not fairly debatable standard is equivalent to arbitrary and capricious in this case, we can turn to the Respondent's final argument, which is that the County's decision in refusing to rezone the parcel is supported by sufficient "evidence." As Respondent says: "The burden of proving the invalidity of a zoning ordinance is on the party attacking it; thus, it is incumbent upon

[Appellant] to show by clear and convincing evidence the arbitrary and capricious nature of the ordinance." Respondent's brief at page 14, citing *Town of Scranton v. Willoughby*, 306 S.C.421, 412 S.E.2d 424 (1991) In *Town of Scranton*, a mobile homeowner moved his mobile home into a zone that prohibited them. By contrast, here the clear and convincing evidence is found in the fact that the complaining neighbors not only established that the Appellant's proposed use is compatible with the area as it exists, but also they identified no objective concern, relying instead on nothing more than their prejudice and speculation to assert without proof that "mobile homes would destroy traffic, safety, and property values."

As set forth in the Appellant's initial brief and above, the Appellant's application for rezoning here **conforms to the County's legislatively adopted Comprehensive Plan**. It is not much of a burden to point out to the County that the application is consistent with its ordinance and the County's decision under review is in conflict with its own ordinance. This indisputable fact makes this case different from every case relied upon by the Respondent. Take *Town of Scranton*, for example. There the Town adopted a zoning ordinance that set up zones for mobile homes, and when the property owner moved a mobile home into an area where the ordinance prohibited it, it is not surprising that the Town told her to move it. Here, the County's Comprehensive Plan has designated the Appellant's parcel as appropriate for R-3, and he asked only that the map be amended to conform to the County's Plan because the Comprehensive Plan is designed to guide and implement zoning. Instead of adhering to its own legislative findings—findings it adopted after years of study and consultation as well as findings that included substantial public participation—the County chose to give greater weight to the putative concerns of a few disgruntled neighbors and restate them as the reasons to deny Appellant's application.

The Respondent's brief helpfully summarizes the assertions of the complaining neighbors, but there is not a *scienter* of evidence that can be identified as supporting their opinions or identifying an objective fact. Everything they identified as being of concern was either: (1) canards based on prejudice, or (2) generic comments applicable to change everywhere. The special circuit judge erred when he misapplied his own reasoning to provide cover for the County Council who did exactly what the special circuit judge erroneously concluded they did not do. In his Order sustaining the denial, the special circuit judge found: "It would be unfair to judge the County's legislative decision because of public comments—however pejorative, uninformed and speculative—that were made in the same vein." (R.O.A. page ____[Order at page 13] Yet, these comments, summarized on pages 9-10, are either irrelevant, offensive, self-refuting, or all three:

Raymond Headden: There is high traffic on Royle Road. It is a 2-lane road. There are 13 trailer parks on Royle Road. There are 316 "trailers" on Royle Road. Someone told him his house depreciated because of the mobile homes. He sees cars, trucks, and mopeds, which is "a common red flag to predict high drug trafficking." He has seen "suspicious people" sitting in his driveway. He has seen "strange vehicles." He has seen trailers "falling apart" or "missing skirting." He saw a boy get hit.

James Jackson: He bought his property 50 years ago when it was rural and it is not rural anymore. The road is blocked when Sangaree School lets out.

Francis Gibson: He has lived there since 1978 and they do not need any more trailers. The area has transformed from acreage to trailers.

Record on Appeal pages ___-____[Exhibit 6]

This is the putative "evidence" which the lower court found sufficient to overcome the County's legislative expression of "rational development of land use, free from undue political

influence" expressed through its legislative decision of the Comprehensive Plan. See Order under review at page 3 (R.O.A. page ____): "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." The legal error is that the County's legislative decision as expressed through its Comprehensive Plan is that the Plaintiff's parcel is exactly where the County legislatively decided should be developed to provide the critically needed affordable housing. (See Goals and Policies, Comprehensive Plan, R.O.A. page ___[Exhibit 1, Attachment B]) As to the area being saturated with "trailers," this is the strongest evidence of the appropriateness of Appellant's request for rezoning because it demonstrates compatibility with surrounding uses. Obviously, the County is not going to permit mobile homes in areas that are zoned otherwise. This is the lesson of *Town of Scranton v. Willoughby, op cit*. Thus if additional mobile homes are not permitted where mobile homes are permitted, then the strategies and goals of the Comprehensive Plan for greater densities and affordability cannot be met. Council's adopted 2015 Plan intended incentives that would "provide affordable housing in close proximity to existing and future employment centers," including Appellant's parcel. Appellant stepped forward with a compatible application that would help the County achieve its goals; however, Council voted against its own well-reasoned and "relevant" Plan for addressing housing needs from changing conditions in Berkeley County. The County's Plan intended to incentivize the very development Appellant proposed. Here, the County says Appellant is limited to build single family homes on a parcel that, as Mr. Headden helpfully testified, is surrounded by 316 mobile homes. It does not require an expert to comprehend that such a project is economically doomed. Under this view, the Appellant is denied any **reasonable**

investment back expectation for his property. When limitations such as these become so onerous as to deprive an owner of reasonable use of property, the courts have struck them down. *Lucas, op. cit., Helicopter Solutions, op. cit*. Because the area is, as the complaining neighbors testified, saturated with mobile homes and mobile home parks, their testimony reinforces the County's Comprehensive Plan legislative decision to designate the area of Royle Road as appropriate for mobile homes to meet the County's critical need for affordable housing. Thus the circuit court's entire conclusion about "rational concerns" (R.O.A. page ___[Order on Reconsideration page ____]) is based upon a self-refuting principle. And lest there be any doubt that the County's reasons to abandon its own legislative findings as expressed in its Comprehensive Plan, the County announced on the record that its decision was based on: (1) the complaints of the neighbors, and (2) the "stuff" that's been going on out there: "Council Member Schurlknight stated that he has a lot of concerns about the effects it is going to have on the individuals that live on Royle Road. They've been there a long time, and have seen a lot. He is hearing that they have hosted a lot of development on the road, and it comes to a tipping point to where you must look at the capacity of the road, and safety. . . . Council Member Schurlknight stated that with that in mind, 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. . . ." (R.O.A. page ___[Exhibit 6, page 6] It is painfully obvious that there is not a shred of evidence in this record to support any of these conclusions. Because there is no evidence to support Council's denial of the request for rezoning, the circuit court erred in upholding it when it is wholly unsupported by anything objective and so obviously at variance with its legislative decision expressed through its Comprehensive Plan. The County's two decisions are inconsistent, and only its adoption of the Comprehensive Plan demonstrates studied reasoning. Unsupported reasons to deny zoning—increased traffic, endangering children, lowering property values—lack

any objective evidence. The two contradictory decisions cause the question of rezoning to be "not fairly debatable," absent any objective concerns worth overcoming the adopted Plan. As the lower court found, "not fairly debatable" equals arbitrary. Council's vote to deny rezoning is proved arbitrary when contrasted with Council's well-reasoned adoption of its Comprehensive Plan. Unless or until Council amends its Plan, Appellant's application to comply with the Comprehensive Plan and its strategies is straightforward and denial is not "fairly debatable." In short, the decision is demonstrably arbitrary and capricious.

Conclusion

Based on the foregoing, Appellant respectfully submits that the Court of Appeals reverse the Order under review and order the County to grant the Appellant's application to make his two parcels subject to the uniform classification of R-3 in conformance with the County's Comprehensive Plan, or, in the alternative, remand to the County Council with instructions to identify which objective facts they are relying on to overrule the legislative decision reached in its Comprehensive Plan.

Respectfully submitted,

/s/ Thomas R. Goldstein_____

March 18, 2021

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

M. Dawes Cooke, Special Referee

Case No. 2017-CP-08-01088

Appellate Tracking Number 2020-001118

Todd Olds, Appellant

vs.

Berkeley County, Berkeley County Planning Commission, Respondent.

PROOF OF SERVICE

I certify that I have served the Initial Reply Brief on the Respondent, Berkeley County and Berkeley County Planning Commission by depositing a copy of it in the United States mail, postage prepaid on March 18, 2021, addressed to their attorney of record, John West, 207 Carolina Boulevard, Moncks Corner, South Carolina 29461 and also by providing a copy by electronic means.

March 18, 2021

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