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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE 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.

BRIEF OF APPELLANT

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IS THE SPECIAL REFEREE'S DECISION CONTROLLED BY ERRORS OF LAW AND FACT BECAUSE THE COUNTY'S LEGISLATIVE DECISION, ITS COMPREHENSIVE PLAN, FOUND THE PLAINTIFF'S PROPERTY TO BE APPROPRIATE FOR THE REZONING HE REQUESTED, AND THE SOLE BASIS FOR DENYING THE REQUEST WAS TO APPEASE OBJECTING NEIGHBORS WHOSE CONCERNS WERE NOT SUPPORTED BY ANY CREDIBLE EVIDENCE?

STATEMENT OF CASE

In 2011, Berkeley County passed its Comprehensive Plan in accordance with § 6-29-510, S. C. Code, ann. In accordance with this Plan, the County evaluated its inventory of property and adopted a Future Land Use Map to govern zoning and development. (Record on Appeal pages 173, 200, and 215 [joint exhibits 3, 8 and 9]. On July 20, 2017, the Appellant purchased two parcels of real estate commonly referred to as 749 and 751 Royle Road. Royle Road is a South Carolina state highway, S-8-535, and a major traffic artery that connects U. S. Highway 78 to U.S. Highway 17-A, crossing over Interstate 26. (See satellite map at pages 178 - 179 of the Record on Appeal [packet pages 21-23, Joint Exhibit 3].) The appellant's property is approximately a thousand feet from Royle Road and Interstate 26. At the time the appellant began investigating the property for purchase, he was aware that the 749 parcel was zoned R-2, mobile home residential, and that the 751 parcel was zoned R-3, mobile home commercial. (Standing on Royle Road and facing the property, the left-hand (south) parcel is the one zoned R-2, and the right-hand (north) parcel is zoned R-3, and appellant will use the designation of "left hand parcel" and "right hand parcel" to simplify the distinction. The classification matrix of the surrounding properties is found in the Record on Appeal at page 174 [packet page 14, joint exhibit 3]. The matrix shows the subject parcel is surrounded by R-2, R-3, and OI, Office and Institutional.) Because he had done his due diligence, the plaintiff was also aware that the County's 2010 Comprehensive Plan had designated Royle Road as appropriate for reclassification to R-3 because the County determined the area was appropriate for higher density residential growth to meet the County's critical need for affordable housing.

On January 24, 2017, Appellant filed an application with the Planning Department to reclassify the left-hand parcel to R-3 to be consistent with the adjoining parcel and consistent to

the County's Future Land Use Map. (R.O.A. page 170 [application]) In accordance with its normal procedure, the Berkeley County Planning Department conducted a site investigation and reported its findings and recommendation to the County as follows:

> The applicant, B. Todd Olds, is requesting to rezone a 1.29-acre parcel, located along Royle Road and indicated by the following TMS number: 233-09-02-046, from Manufactured (R-2) to Mobile Home (R-3). According to the Application, the applicant wishes to conform with the adjacent property (TMS 233-09-02-007) which is already zoned R-3. The Applicant's intent is to combine the subject property with the adjacent 1.2 acre R-3 zoned parcel (TMS 233-09-02-007) Upon combination, the 2-acre minimum lot size requirement for R3 zoning would be met."
>
> . . .
>
> **Conformance with Comprehensive Plan:** **Yes.** -- The subject property contains the 2010 Future Land Use Plan recommendation of *Low Density Suburban*, which seeks to include diverse housing choices and will act as a transition from Constrained Growth Areas to higher density residential and commercial areas.
>
> Staff Recommendation: **APPROVAL – Staff recommends approval of this request as it provides an opportunity for the development of a diversity of housing options, which align with Future Land Use Plan and are compatible in the context of the area concerned.** The proposed use of the property is compatible with surrounding land uses. There is also an understanding between the applicant and the Planning Department that parcels 233-09-02-046 [left hand parcel] and 233-09-02-007 [right hand parcel] will be combined and recorded prior to third reading at County Council.
>
> R.O.A. page 174 [joint exhibit 3] (boldface and underline in original)

After the Staff filed its recommendation, the County scheduled the application for three meetings: On February 28, 2017, Appellant appeared before the Berkeley County Planning Commission, which voted unanimously to deny recommending approval. Then Appellant appeared before the County Council twice, first on March 13, 2017, before the County Council's *Land Use and Economic Development Committee* and then on March 27, 2017 before the County Council. (The *Land Use Committee* and County Council are the same members, so, for purposes of this brief, Appellant treats them as the same. Moreover, the "meeting" before the *Land Use Committee* on March 13th was not much of a meeting since before any spoke about the application, Councilmember Newell informed the Committee that because the property was in his district, it

was his decision to make, and he had already decided without hearing the evidence. R.O.A. page 255 [tr. page 36, lines 16-18: "I think myself being the councilman for that district, I should have the right to say approval or disapproval." He made a motion for denial, which was seconded, before anyone said a word. R.O.A. page 256 [tr. P. 37]) Thus, the Planning Commission voted unanimously to overrule the Planning Department staff and recommend disapproval, and the *County Council Land Use Committee* voted 6-2 and the Council voted 5-2 to deny the request to rezone to R-3. To promote judicial economy, Appellant treats all three meetings as a single cumulative denial because the subject matter, the participants, the objections and the analysis (or lack of analysis) in each meeting are indistinguishable. In other words, the same complaining neighbors advanced the same subjective and speculative complaints at each meeting and all three denials are grounded on the same unsupported allegations of complaining residents. Here is how Councilman Schulknight summed it up: ". . . with that in mind, again, I've been down Royle Road many a times; I've been down Royle Road for the last 40 years. And I've seen a lot of stuff going on over there, all the development in that area. And I feel for you, I really do. And I know—I'll be remiss to sit here and try to tell you that it doesn't devalue your property, because it does." (R.O.A. page 278 – 279 [tr. page 59, line 20—page 60, line 3, Councilmember Schurlknight]) Therefore the three meetings can be safely treated in a single analysis. (It may be worthwhile to mention that the two members of County Council who voted to grant the request are the only two members who have formal legal training.) The Minutes and the votes of these three meetings are found in the Record on Appeal at pages 185, 189, and 194.

On April 28, 2017, the appellant filed an appeal with the Berkeley County Court of Common Pleas. (R.O.A. page 28) The complaint alleges that the decision to deny rezoning is arbitrary and capricious. The complaint also sought damages; however, the parties agreed that any

application for damages is premature, and for that reason, on March 29, 2019, the parties agreed to refer the case to M. Dawes Cooke as Special Referee to make findings of fact and conclusions of law and to enter a final order directly appealable to the Court of Appeals on a single issue; to wit whether the County's denial of the appellant's application was or was not arbitrary and capricious. (Prior to referring the case to the Special Referee, Appellant moved for summary judgment, which the Court denied by Order dated October 2, 2018, R.O.A. page 26.

The parties briefed the issue to the Special Referee, and on December 10, 2019, the Special Referee scheduled oral argument. Following oral argument, the Special Referee entered an Order on May 12, 2020, upholding the County Council's decision to deny the rezoning. R.O.A. page 5. The appellant filed a motion for reconsideration on May 21, 2020, and on July 23, 2020, the Special Referee denied reconsideration. R.O.A. pages 110 and 1. This appeal followed on August 7, 2020. (R.O.A. page 131)

FACTS

The facts are undisputed and set forth in the Statement of Case. Two facts not summarized in the Statement of Case are that (1) The County's Comprehensive Plan is the County's legislative decision as enacted by ordinance, and (2) the Royle Road residents' complaints are not based on anything objective. Rather, every concern they identified is grounded upon nothing more than their prejudicial opinions about residents of mobile homes and that 14 more mobile homes on Royle Road would adversely affect their property interests and their safety. As set forth above, these subjective and speculative concerns were summarized by Councilman Schurlknight as the "stuff" going on out there on Royle Road, but in deciding against the Appellant's request for rezoning, the County Council disregarded the findings of its own Comprehensive Plan. The

residents' complaints are occasionally hard to read because they express brazen prejudice and stereotyping. Consider this representative testimony the Headden's:

> And I am really against another mobile home park coming in there. And I have seen so many things go on with the one right next door to me, where I've had to go to many court cases for animals that were abused, animals left, um, unattended that come over to my property. There is no restriction on how well they keep these homes up.
>
> **And, you know, I hate to stereotype, but it is what it is**, and we've got problems with too many mobile home parks there now. And if you were to come into my home and sit down to watch television with the door open, which I have a full glass storm door, which we like sit there with the door open, and you look outside, you're looking straight at a mobile home that has had a porch that is—I don't know how the people walk up on it—air-conditioners sitting out in the yard with a burn barrel next to it, and the grass gets cut maybe three times out of the summer.
>
> And I just don't want to see another mobile home park coming in there. And not only that, the traffic has got to a point to where if any of you were to travel Royle Road in the middle of the day during the school time, you couldn't get through. You have to stop. The cars are parked on the side of the road.
>
> This is going to cause more kids to come in, which is going to make that situation even worse. So I am against the mobile home park.

Then Mrs. Headden followed up with this canard:

> And if you all had to live beside the one that I live beside and across from the one that this gentleman is talking about, you wouldn't want to see another trailer pulled in anywhere. Because we see Berkeley County—it's on a daily thing. We smell meth being cooked. My husband was a fireman for 30 years.
>
> MR. RAYMOND HADDEN: I am trained in clandestine drug labs, so I know what it smells like.
>
> R.O.A. pages 246 248 [tr. Page 27, line 16 through 29, line 24] (emphasis added)

The minimal probing from the Planning Commission yielded further clarifications from the Headden's that demonstrate the lack of foundation for their beliefs. According to them, the police could not locate any "meth labs" because "these guys are pros at what they're doing. They know when they're [the police] coming, and they know what to do to avoid their appearance." (R.O.A. page 249 [tr. Page 30, lines 12-14]). The Special Referee erred when he found that completely unsupported assertions from complaining residents were "barely sufficient'' concerns

about traffic and safety are enough to prevent the County's denial from being arbitrary and capricious:

> 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 business. 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." (R.O.A. page 17 [May 12, 2020 Order at page 13])

Thus, the one fact that merits emphasis in the Statement of Facts is this: the purely subjective complaints identified by Royle Road residents, typified by the Headden's, are not based on facts but are grounded entirely on unsupported, subjective opinions, and under the Court's slippery slope logic, no property owner is permitted the highest and best use of his or her property without the approval of neighbors. (Rather than lengthen the brief unnecessarily, Appellant directs the Court to the summary of complaints tallied in the Record on Appeal at pages 41 – 42 [affidavit of Todd Olds]. Therefore the most important fact in this case is the **absence** of facts before the County Council and the conclusion that flows from the absence of objective criteria: that Council based its decision on nothing more than hyperbole, speculation, or as Councilmember Schurlknight described it: the "stuff going on out there." (R.O.A. pages 198 and 278 – 279 [Minutes of March 27, 2017 County Council meeting, tr. Page 59, l. 19-page 60, l. 15]) The only objective criteria in the record are the findings of the County when it adopted its Comprehensive Plan and Future Land Use Map by ordinance. In other words, despite the enormous amount of work—including public participation—put into adopting its Comprehensive Plan, the Council ignored its own legislative findings to appease complaining residents.

Arguments

A. The County's decision was arbitrary and capricious.

B. The County's decision was at variance with its legislative findings as expressed in the adoption of its Comprehensive Plan and Future Land Use Plan.

C. The opposing neighbors presented nothing in opposition to the request for rezoning other than their legally insufficient unsupported prejudice.
1) *Bannum v. City of Columbia*, 335 S.C. 202, 516 S.E.2d 439 (1999)
2) *Wyndham Enterprises v. City of North Augusta*, 401 S.C. 144, 735 S.E.2d 659 (Ct. App. 2012)
3) *Helicopter Solutions v. Hinde*, 414 S.C. 1, 776 S.E.2d 753 (Ct. App. 2015)

A. The County's decision was arbitrary and capricious.

The parties and the circuit court stand on common ground with the proposition that courts are required to uphold legislative decisions provided they are "fairly debatable," and it was on this conclusion that the Special Referee upheld the Berkeley County Council's decision: "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." (R.O.A. page 23 [Order at page 19]) There are several material errors in this conclusion that require reversal.

First, the circuit court erred by giving the same weight to unsupported speculation of complaining residents to the weight of the County's carefully reached "legislative decision" as adopted and codified by the County in its 2010 Comprehensive Plan and Future Land Use Plan. (See R.O.A. pages 134 - 169 for Ordinance 18-04-11 2017 review of the 2010 Comprehensive Plan. [Joint Exhibit 1] The County's legislative decision is contained in the extensive investigation and deliberation that led to its adoption of its Comprehensive Plan, not in the complaints of complaining neighbors who do not want "those people" in "our" neighborhood. The County adopted, by Ordinance 18-04-11 on April 23, 2018, renewing its 2010 10-year Comprehensive Plan after

extensive investigation and public comment. (R.O.A. page 133 [ordinance, Joint Exhibit 1]. The *Comprehensive Planning Enabling Act of 1994*, § 6-29-510, *et. seq.* requires each county to adopt a Comprehensive Plan, and the statutorily required process mandates extensive public participation as well as the evaluation and incorporation of objective data in arriving at a Plan. On its Home Page, Berkeley County summarizes the process as follows:

> The 2010 Comprehensive Plan was a 2-year process that involved several rounds of public input meetings providing citizens and business owners the opportunity to help shape the plan. In addition, monthly meetings were held involving the public, county planning staff, BDC Council of Government's staff, and the Planning Commission. Several guest speakers were invited to give presentations providing valuable information to the Planning Commission. The plan was officially adopted by County Council on June 27, 2011.

Berkeley County's Comprehensive Plan (R.O.A. pages 215 – 219 [G1.2 Comprehensive Plan, Joint Exhibit 9, page 1-2]) identifies a critical shortage of affordable housing in Berkeley County, and as part of the evaluation of land use after conducting numerous workshops and public meetings, the County adopted a "Future Land Use Plan," which identified Royle Road as the appropriate location for the creation of affordable housing. The circuit court's legal error is that it found the complaining neighbors' subjective, speculative and unsupported assertions about the behavior of future residents were equal to the specific conclusions reached by County Council in adopting the Comprehensive Plan. The Comprehensive Plan is an ordinance and has the force of law. See Berkeley County Ordinance § 1-2, "Purpose." This requirement, which the Special Referee incorrectly applied as a "suggestion," makes clear the force of the ordinances: "It is the purpose of this ordinance to: **Implement the goals and policies outlined in the Berkeley County comprehensive plan.**" (R.O.A. page 345, emphasis added) The elevation of complaining residents over the rational conclusions adopted in The Comprehensive Plan is palpable legal error as many cases have held, three of which are more fully addressed in Section C below. Grounding a legislative decision on prejudice

does not provide a legally sufficient basis to reach a "fairly debatable" standard for legislative design, especially when those subjective concerns are at variance with the legislative findings and conclusions Berkeley County adopted in its Comprehensive Plan. A legal decision based on speculation of future harm can never be "fairly debatable," any more than a judge can find a defendant guilty because the Court suspects he might cause trouble if set free. The two bases for conclusion are incompatible with one another, and the trial court erred in equating the unsupported speculation of complaining residents with the rational deliberation of Berkeley County government in enacting its Comprehensive Plan and Future Land Use Plan.

Also perplexing is the Special Referee's reliance on complaining neighbors' assertions that because the area was already supporting numerous mobile homes, therefore no more should be allowed. See the testimony of Raymond Hedden: "There are 13 trailer parks presently on Royle Road that I personally counted from I-26 overpass northeast to Highway 17-A." R.O.A. page 266 [tr. Page 47, lines 12-14]. This "saturation" testimony, which runs through the testimony of all the complaining residents, turns both logic and the law of zoning on their heads. By this crazy logic, mobile homes are only allowed where they are not allowed. On the one hand, Berkeley County, through its exhaustive planning process, determined that Royle Road is the proper location for mobile home parks, but on the other hand, the same governmental entity that adopted its Comprehensive Plan and Future Land Use Plan allowed complaining residents to veto it. The logical absurdism leaps out because if mobile homes are not allowed where the County allows them, then they are not allowed anywhere. Appellant had low expectations that the County Council would recognize this self-refuting proposition because logic in politics does not carry the same force as it does in law. The circuit court erred in allowing this absurdity to serve as a basis for supporting a conclusion that the debate is "fairly" debatable.

Moreover, the Special Referee's conclusion that he was required to yield to the concerns of complaining residents is an abdication of judicial responsibility. (The circuit court touched on this concern in footnote 2 on page 2 of its May 12, 2020 Order. R.O.A. page 6. Because a denial of substantive due process = arbitrary and capricious, an analysis of one is equally valid for the other. They are different expressions for the same legal wrong, and they can be used interchangeably. No court has ever held that an arbitrary or capricious decision is anything but a denial of substantive due process. See: *Sloan v. South Carolina Bd. Of Physical Therapy Exam'rs.*, 370 S.C. 452, 483, 636 S.E.2d 598, 615 (2006))

The issue raised by this case is what role does the court play in evaluating legislative actions, a role that has been widely discussed in recent months. Few events in American history have drawn as much attention to the critical importance of an independent judiciary as much as the recent election challenges raised in state and federal courts. This is not to say that the Courts are infallible—Courts do make mistakes even at the highest level as cases such as *Plessy v. Ferguson* have demonstrated, but what distinguishes political assaults on justice from serious judicial errors is that Courts, unlike politicians, are always striving to get it right by employing the pillars of justice: logic, reason, and precedent. In other words, the purpose of judicial review. In exercising judicial review, there is no doubt that courts are deferential to legislative decisions, but from *Marbury v. Madison* right through to *Village of Willowbrook v. Olech* to *Austin v. Board of Zoning Appeals*, 362 S.C. 29, 606 S.E.2d 209 (2004), courts have never failed to protect a citizen's legal rights against arbitrary governmental actions. As may be seen by reference to any of the specific cases discussed in Section C below, the South Carolina courts have never hesitated to correct "legislative decisions" when those decisions are arbitrary or capricious.

Since specific South Carolina authority as relates to weighing the subjective concerns of complaining residents is digested in Section C below, Appellant ends Section A by addressing the Special Referee's error in failing to apply traditional notions of arbitrary and capricious. One of the most frequently cited and clear expressions of what constitutes "arbitrary" in the arena of land use is the Fourth Circuit's decision in *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810 (4th Cir. 1995). There, a property owner sought permission to develop his parcel into a single family development called "Blue Dolphin Estates," and the residents turned out in force, complaining, as here, that the proposed development would create traffic woes, devalue their property *etc*. For reasons identical to this case—except there were no allegations of phantom meth labs—the County Board turned down the property owner's request and forced him to bring an action to obtain a court order to compel the County to issue the permit. The landowner succeeded in this application, and the County issued the building permit. However, the landowner then brought a second lawsuit in which he alleged he had suffered damages resulting from the 11-month delay he incurred in obtaining a court order to reverse the County's initial denial, which it based on the same type of unsupported neighbor complaints involved here. Even though the court turned away the plaintiff's claim for damages, it analyzed whether County boards could make "fairly debatable" legislative decisions based entirely upon unsupported complaints of residents:

> Sylvia Development and Dohnal timely appealed the Board's resolution to the Circuit Court for Calvert County. In May 1990, the Circuit Court reversed the Board's decision as unsupported by probative evidence. The court's opinion explained that under Maryland law the Board, sitting as an adjudicative body in a TZD application hearing, was required to render a final decision with findings of fact based upon substantial evidence in the record. In the case of Blue Dolphin Estates, the court found that the only support in the record for the Board's finding of inadequate road access consisted of the "unsubstantiated, generalized concerns" of local residents. Such lay testimony, without more, could not be considered probative in the face of contrary expert evidence produced by engineers from the County Planning Commission and several state agencies. The court also summarily rejected the Board's second and third findings, as the consultant's report on water supply was never admitted into the record and the "contrary to public interest" determination was asserted

without any factual basis. The court held that an adjudicative agency decision made without the support of any record evidence was by definition "arbitrary" and ordered the Board to grant Sylvia Development's TZD application. The Board did so in a resolution issued July 3, 1990.

Here, the case is much stronger for it is the County's statutorily enacted Comprehensive Plan that serves as its "expert evidence," which is stronger evidence than that provided by the "engineers from the County Planning Commission and several state agencies" in *Sylvia*. What was expert opinion in *Sylvia*, is a duly enacted ordinance here. When the Special Referee allowed complaining residents' unsupported concerns to veto the County's Comprehensive Plan, he committed legal error. As will be discussed in Section C below, the South Carolina appellate courts have consistently decided that legislative decisions grounded solely on NIMBY complaints are the very definition of arbitrary.

Finally, the Special Referee's decision to hold appellant to an evidentiary standard of "extremely high burden" is erroneous. Appellant concedes that courts give deference to legislative bodies on legislative decisions, but when a governmental body takes up a citizen's request for relief from arbitrary or capricious government treatment, the burden of showing the decision is controlled by an error of law is no different from any other appeal. Not to put too fine a point on this subject, but courts are not potted plants. In *Austin v. Board of Zoning Appeals*, 362 S.C. 29, 606 S.E.2d 209 (2004), Judge (now Justice) Kittredge writing for the Court, took up the issue of the appropriate standard of review on cases being reviewed from the Board of Zoning Appeals. There, he noted that "[a] court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision." *Restaurant Row Assoc. v. Horry County*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999). "However, a decision of a municipal zoning board will be overturned it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion." *Id.*" Thus, while an appellant's burden in challenging local governmental action on land use may be

high, the Special Referee erred in applying an "extremely high burden" on the appellant because a court has a duty to prevent a citizen's fundamental property rights from being curtailed by arbitrary or capricious action. While appellant concedes that he cannot turn the Court of Appeals into a supervisory County Council, he firmly believes that he can petition the Court to address an injustice. As the Court of Appeals said in *Deese v. S.C. State Board of Dentistry*, 286, S.C. 182, 332 S.E.2d 39 (Ct. App. 1985): "A decision is arbitrary if it is without a rational basis, is based along on one's will and not upon any course of reasoning and exercise of judgement, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." Here, the Special Referee's basis for affirming Council is based on no fixed rules or standards, but entirely upon unsupported assertions. The County's "fixed rules or standards" are those expressed in its Comprehensive Plan, which the Special Referee found to be a mere suggestion. As discussed more fully below, each time a local governing body ignored its own ordinances and denied landowners' requests to use property to its highest and best use by relying upon unsupported complaints of neighbors, the Courts have never failed to protect property rights from erosion.

Appellant submits one more example demonstrating that the appellant's burden in such a case may be high, it is erroneous to characterize it as "extremely" high. In a powerful work of legal analysis that focused on whether the State of South Carolina has the authority to require a convicted felon to submit to lifetime electronic monitoring after her release from the Department of Corrections after serving her sentence, the Supreme Court took up the question as to whether such legislative decision did or did not violate the plaintiff's due process. While holding that a challenge to the constitutionality of a statute must be proven beyond a reasonable doubt, Justice Hearn, writing for the Court stated:

However, one does not have a general liberty interest simply in being free from arbitrary and capricious government action. *Hawkins v. Freeman*, 195 F.3d 732, 749 (4th Cir. 1999) (*en banc*). Rather, "the substantive component of the due process clause only protects from arbitrary government action that infringes a specific liberty interest." *Id.* If the interest infringed upon is a fundamental right, the statute must be "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993); see also *In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 140, 568 S.E.2d 338, 347 (2002). If the right is not a fundamental one, the statute is only subject to rational basis review. *Luckabaugh,* 351 S.C. at 140, 568 S.E.2d at 347. Dykes does not argue South Carolina's satellite monitoring scheme fails the lesser rational basis review, choosing instead to rely exclusively on strict scrutiny. Accordingly, we proceed only under this heightened review and must first determine whether the alleged right the statute infringes upon is fundamental.

South Carolina v. Dykes, 398 S.C. 351, 728 S.E.2d 455 (2012)

As both the State and Federal Constitutions make clear, the right to own and use property is "fundamental." In 2013, the Supreme Court withdrew Justice Hearn's 2012 Opinion, which contained a concurring opinion by Justice Kittredge, and reissued it with Justice Kittredge writing the Opinion, with a dissent by Justice Hearn. (The 2012 Opinion reversed the trial court; the 2013 Opinion affirmed the Court of Appeals as modified.) The only difference between the 2012 and the 2013 Opinions is that the Court narrowed the portion of the statute it declared unconstitutional, but Justice Kittredge articulated the same legal principal as Justice Hearn in 2012 concerning the burden of proof when challenging government action although he stated it differently:

The complete absence of any opportunity for judicial review to assess a risk of re-offending, which is beyond the norm of Jessica's law, is arbitrary and cannot be deemed rationally related to the legislature's stated purpose of protecting the public from those with a high risk of re-offending. See *Luckabaugh*, 351 S.C. at 139-40, 568 S.E.2d at 346 (finding due process ensures that a statute which deprives a person of a liberty interest has "at a minimum, a rational basis, and may not be arbitrary"); *see also Lyng v. Int'l Union*, 485 U.S. 360, 375 (1988) (Marshall, J., dissenting) (noting that although allegedly arbitrary legislation invokes the least intrusive rational basis test, that standard of review "is not a toothless one") (quoting *Matthews v. De Castro*, 429 U.S. 181, 185 (1976)))

Thus, while the appellant must carry the burden of proof, it is not correct to characterize it as being "extremely high," and the standard of review is not "toothless." Even the lower standard of review requires that a legislative decision be "rationally based," but the Special Referee affirmed the

County Council by imposing an impossibly high standard of review on the appellant and by erroneously equating legislative findings of the Comprehensive Plan with unsupported speculation of complaining residents.

B. The County's decision was at variance with its legislative findings.

As discussed above, the Special Referee determined that the County's legislative discretion was properly exercised even though it was at variance with its own ordinance and based only on speculation of complaining neighbors. The Special Referee concluded that the concerns of the complaining residents was sufficient to justify its decision to deny rezoning. The parties agree that the decision of the Council must be affirmed if it is at least "fairly debatable." If Council's decision to deny Plaintiff's rezoning request is "fairly debatable," then the circuit court's conclusion is correct, and Appellant cannot prevail. However, if the decision is not "fairly debatable," then the Court's May 12, 2020, Order is based not only on an incorrect application of South Carolina law, but also on an erroneous finding of fact. The question then is whether the record contains any evidence to support the Court's conclusion that the Council's decision is "fairly debatable," and it is here that the Court errs.

First, the term, "fairly debatable," cannot either be read or applied in a vacuum. The term, "fairly debatable," contains two words, an adjective, "debatable," modified by an adverb, "fairly." (Of course, the adjective, "debatable," is based on the noun "debate.") Neither the noun, debate, nor the adjective, debatable, requires discussion—the parties agree that anything and everything is subject to "debate" and is, therefore, "debatable." In logic and mathematics, everything and nothing, are interchangeable and equivalent—in any mathematical equation, $\infty = 0$ and $0 = \infty$. So saying something is debatable sheds no light on our inquiry because if everything is debatable than nothing is debatable. (The U.S.S. Yorktown became stranded in the Caribbean Sea when its computer

operated system shut down because a coding error attempted to divide by zero, demonstrating that ignoring logic can have real world consequences.) Our inquiry is not whether the subject of this action is debatable; our inquiry is whether the subject is "fairly" debatable.

An examination of the trial court's application of the adverb, "fairly," requires careful attention and which, when analyzed, reveals the error of the Order under review because if the issue is not **fairly** debatable, then the decision is arbitrary and must be reversed. "Fairly" means "Equitably, honestly, impartially, reasonably." *Black's Law Dictionary*, Fifth Ed. The case most frequently cited in South Carolina for the "fairly debatable" standard in land use cases is *Harbit v. City of Charleston*, 382 S.C. 383, 675 S.E.2d 776 (2009) (The undersigned was appellant's lawyer.) *Harbit* is the exact opposite of the present case. In *Harbit*, the Court of Appeals upheld the City's decision to deny the property owner's request to be included in the Ashely River Overlay District "because the City proffered several reasonable grounds for the denial of Harbit's rezoning application." In *Harbit*, the City argued that his property was a necessary buffer between the development taking place along Wesley Drive and the residential neighborhood behind him. (An unpublicized irony of the *Harbit* case is that the City offered his predecessor in title the opportunity to come into the overlay district and she declined. Then when Harbit asked to come in, the City said no.) As a result, the *Harbit* case is the exact opposite of the present case because here the "several reasonable grounds" of *Harbit* are the County's legislative determination as expressed through its Comprehensive Plan that the Appellant's property **is** properly reclassified as R-3—see Staff recommendation set forth above on page 5. Here, Appellant purchased the property because he did his due diligence and saw that the County made its legislative decision, based on a careful, deliberative process, including public participation, to designate the property as appropriate for R-3. The record here demonstrates that the only reason the County denied him was to satisfy the unsupported concerns of complaining residents

at variance with its own ordinance. Thus, the Court makes a mistake on page 13 (R.O.A. page 17) when it concludes that the record contains evidence supporting Council's denial: "However, evidence in the record suggests that the residents of that area had for years consistently opposed more mobile homes[1] and the County consistently denied applications for them." This is incorrect. The only objective evidence in the case is the evidence (1) contained in the County's Comprehensive Plan and its Future Land Use Plan, (2) the facts presented by the Planning Department Staff, and (3) the complaining neighbors admission that the area already contains numerous mobile homes. All the testimony about whether future residents would monitor their children or abuse their pets or cook meth was pure speculation typified by the Headden's testimony quoted above and discussed in more detail in the next section. Instead of wild speculation, Berkeley County, through its legislative process, determined Royle Road is the appropriate place for allowing additional mobile homes for the reasons stated in the Staff Report (Exhibit 3) and in in the Comprehensive Plan. The Court's slippery slope conclusion runs in the opposite direction it intended because if Council can deny appellant's request without any **evidence** of impact on safety, traffic or children, then it can deny every multi-family residential project anywhere else for no reason at all, and since Berkeley County is experiencing a residential boom, it is clear that this decision is premised on nothing more than an unsupported prejudice that classifies residents of mobile homes as second-class citizens.

As discussed above, everything is subject to debate, even existence itself, but when faced with the issue of whether a governmental action is or is not arbitrary and capricious, Courts have focused on whether the legislative debate is fair or unfair. (See definition of "fairly above on page 19.) Even

[1] As the video and transcript of record of the meetings depict, the complaining neighbors consistently emphasized the proposed homes as "trailers." Their emphasis on this pejorative term reveals prejudice. Councilmember Davis spoke up on behalf of residents of mobile homes, informing the Council that he and his wife's first home was a mobile home. (R.O.A. page 275 [tr. page 56] Appellant's lawyer is a part time resident of a mobile home.

the Special Referee correctly noted on page 7 of its order (R.O.A. page 11), citing *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4th Circ. 1995): "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.'" (R.O.A. page 11 [Order page 7]) Thus a zoning decision is arbitrary if it is unsupported by **evidence** of a "substantial relation to public health." Courts express the distinction between a substantial relation and arbitrary relation by voiding legislative decisions determined to be "arbitrary" or "capricious." Expressed logically or mathematically, this formula is: "fairly debatable" = "not arbitrary" or "not capricious." A legislative decision that is "fairly debatable" cannot be simultaneously "arbitrary or capricious." By the commutative operation (a + b = b + a), if a decision is arbitrary and capricious, then it is not "fairly debatable." Either formulation allows the proposition to be put through the syllogistic rules of logic, which logicians call "*Modus Tollens*" [by denying denies]:

If p then q.	If fairly debatable then not arbitrary or capricious.
Not q.	Arbitrary and Capricious (*i.e.* "without a rational basis, based on one's will and not upon any course of reasoning and exercise of judgment, made at pleasure, without adequate determining principles, or governed by no fixed rules or standards." *Deese v. S. C. State Board of Dentistry*, 286 S.C. 1882, 332 S.E.2d 539 (Ct. App. 1985))
Therefore not p.	Therefore, not fairly debatable

Thus, the circuit court reached the correct conclusion if, and only if, the legislative decision to deny the landowner's request for rezoning is not arbitrary or capricious, and this requires the Court to apply the well-established legal definitions of arbitrary and capricious in South Carolina law to the record.

As this circuit court said on page 12 of its Order (R.O.A. page 16), "The decision was for the Council to make, **after due deliberations and taking into account all of the facts**." This sentence highlights the error because the record shows no evidentiary support for the required "due deliberation." In making the motion to deny the application for rezoning, Council Member Schurlknight summarized the lack of evidence by stating he was basing his decision on the fact that he has been down Royle Road and is concerned about the "stuff" going on out there. The only indication of "stuff" is the testimony of residents that people who live in mobile homes will not look after their pets, their children and they will cook meth. Councilmember Schulknight's explanation is not supported by a *scintilla* of evidence and thus as a matter of law, there could not be "due deliberation." A judge does not submit a case to a jury if there are no facts upon which a reasonable jury could make a finding, and the absence of facts in opposition to the application is what distinguishes this case from *Harbit*—especially because here, unlike *Harbit*, the County's Future Land Use Plan provides the "proffered several reasonable grounds." In *Harbit*, the City made specific findings and reached definite conclusions, which is exactly the opposite of what happened here. In *Harbit,* the City's Overlay Zone is equivalent to the County's Comprehensive Plan and Future Land Use Plan. For the cases to be equivalent, the Staff Recommendation would have to be the opposite of what it is. Instead, unlike *Harbit*, here, the only "facts" in the record on which the Council could rely are those put forth by the Planning Department and the Council's own Comprehensive Plan, both which support the application. By stating that the decision is based on unsupported "stuff," and the putative devaluation of property values, the County Council conceded it was making an arbitrary decision based on prejudice. Remember, as discussed above, Councilmember Newell made a motion to deny the application **before he heard it**! He also claimed it was his decision because the property is in his district. In short, this record demonstrates there was no "due deliberation" in Council's

decision making—only unsupported prejudice. The record lacks support for Council considering any fact put forward by a complaining resident, let alone deliberating "all" the facts.

In affirming an administrative decision to grant a mining permit in *Bursey v. South Carolina Department of Health and Environmental Control*, 360 S.C. 135, 600 S.E.2d 80 (Ct. App., 2004), *cert.* granted, affirmed at 369 S.C. 176, 631 S.E.2d 899 (2006)[2] the Court of Appeals said:

> Under the scope of review established in the APA, this Court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(A)(6) (Supp. 2003); *Long Cove Home Owners' Ass'n. v. Beaufort County Tax Equalization Bd.*, 327 S.C. 135, 488 S.E.2d 857 (1997). A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions or decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record," or "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-23-380(A)(6)(e), (f) (Supp. 2003); *McCraw v. Mary Black Hosp.*, 350 S.C. 229, 565 S.E.2d 286 (2002); *Waters v. South Carolina Land Res. Conservation Comm'n*, 321 S.C. 219, 467 S.E.2d 913 (1996); see also *Etheredge v. Monsanto Co.*, 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002) (stating court may not substitute its judgment for that of agency as to weight of evidence on questions of fact unless agency's findings are clearly erroneous in view of reliable, probative, and substantial evidence on whole record).

As set forth above, this Court defines capricious for us:

> A decision is arbitrary if it is without a rational basis, is based along on one's will and not upon any course of reasoning and exercise of judgement, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards. Hatcher v. South Carolina District Council of Assemblies of God, Inc. 267 S.C. 107, 226 S.E.2d 253 (1976); *Turbeville v. Morris*, 203 S.C. 287, 26 S.E.2d 821 (1943). *Deese v. S. C. State Board of Dentistry*, 286 S.C. 182, 332 S.E.2d 539 (Ct. App. 1985)

As discussed above and throughout this brief, the circuit court erred when it concluded that: ". . . neighbors' fears about increased housing density and its attendant aggravation of traffic congestion and increased burden on infrastructure are fairly debatable." (R.O.A. page 17 [Order page 13]) They are only "debatable" if, and only if, they require no evidence. This error, as discussed

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[2] An unrelated portion of the case is overruled at *Allison v. W. L. Gore & Assoc.*, 394 S.C. 185, 714 S.E.2d 547 (2011) (Timeliness of appeal is appellate question, not subject matter question.)

above, is that while the neighbors' assertions may be "debatable," when they lack evidentiary support for them, they cannot be "fairly debatable." Thus, the decision becomes, by definition, arbitrary and capricious under the established definitions quoted above. The Council relied entirely upon the neighbors' speculations and canards, leading to a decision "without a rational basis, . . . based on [their] will, and not upon any course of reasoning and exercise of judgment, . . . made without adequate determining principles [and not] governed by . . . fixed rules or standards." The Planning Department, on the other hand, by utilizing the objective criteria of the Comprehensive Plan and Future Land Use Plan, concluded that the area has transformed over the years—this was the complaining residents' complaint—which is why the Comprehensive Plan designated the lot as one to be rezoned to bring it in conformity with the adjoining lot and the surrounding neighborhood, including the bordering "office and institutional" designation. Thus, all the "fixed rules or standards" contained in The Comprehensive Plan support the request for rezoning.

Therefore, this record demonstrates that there is not a scintilla of evidence that can support a conclusion that the application for rezoning to bring the property in conformity with the County's legislative decision as adopted by ordinance in its Comprehensive Plan was supported by the baseless claims of complaining residents.

C. The Council's decision to deny rezoning was based on nothing more than unsupported speculation of opposing residents.

1) ***Bannum v. City of Columbia,* 335 S.C. 202, 516 S.E.2d 439 (1999)**
2) ***Wyndham Enterprises v. City of North Augusta*, 401 S.C. 144, 735 S.E.2d 659 (Ct. App. 2012)**
3) ***Helicopter Solutions v. Hinde*, 414 S.C. 1, 776 S.E.2d 753 (Ct. App. 2015)**

South Carolina jurisprudence has a well-developed body of law that a property owner's right to use his or her property to its highest and best use cannot be overruled by the unbridled and

unsupported speculation of complaining property owners. While there are any of dozens of cases standing for this proposition, Appellant cites the following three as representative:

1) *Bannum v. City of Columbia*, 335 S.C. 202, 516 S.E.2d 439 (1999)

In *Bannum*, a property owner sought to obtain a permit to construct a "halfway house" in a residential neighborhood. In a fact pattern identical to this case, residents turned out in force and argued against the issuance of the permit—which required a special exception from the Board of Zoning Appeals—because they did not want "those kinds of people in our neighborhood." The Board refused to grant the special exception "holding the halfway house would have a negative impact on traffic and vehicular and pedestrian safety. The circuit court affirmed the ZBA's denial of the permit." *Bannum, op. cit.* These grounds and this rationale is precisely the same grounds and rationale as here.

On review, the Supreme Court reversed because it found the refusal to grant the permit to be "arbitrary." The Supreme Court reached this decision because it found that the neighbors' concerns about "traffic" and "safety" and "recidivism" to be wholly unsupported and nothing more than their raw speculation:

> After reading the entire record in this case, it is inescapable to us that the ZBA's decision was based, not on the requirements of the "special exception" ordinance, but upon the fears of neighboring residents who did not want "those type of people" in their neighborhood. Although we are sympathetic to the concerns of neighboring individuals, the ordinance simply does not provide such a basis for denial of the permit. Accordingly, the circuit court's order affirming the denial of Bannum's special exception permit is REVERSED.

Bannum v. City of Columbia, op. cit.

2. *Wyndham Enterprises v. City of North Augusta*, 401 S.C. 144, 735 S.E.2d 659 (Ct. App. 2012)

The precise legal issue of the requirement for objective facts as the minimum threshold for a "fairly debatable" decision came before the Court of Appeals in 2012 when a Board of Zoning

Appeals refused to grant a special exception for an application to open a fireworks store. In a scenario identical to this case, the nearby residents turned out and objected to the permit for the same reasons expressed here: traffic and safety and loss of quality of life. Like the present case, the complaining neighbors said that the area already had a fireworks store. The Court of Appeals' analysis there controls the outcome here, which can be demonstrated by substituting "mobile homes" for "fireworks" in the Court's 2012 opinion:

> We find the BZA's decision was arbitrary and capricious. Regarding the third criterion, the BZA determined the special exception would not discourage or negate the use of the commercially zoned property immediately surrounding the property but would have a detrimental impact on existing and proposed residential development. At the hearing, residents testified as to their concerns regarding the proposed [mobile homes]. These concerns included an increase in traffic, a decline in property values, and a detrimental impact on the [401 S.C. 150] character of the surrounding area. The testimony proffered was based on speculation and opinion. Although property owners can generally testify as to the value of and damage to their own property, here only one of numerous witnesses addressed the special exception's effect on property value. Moreover, the property owner did not testify about his specific parcel but rather testified broadly about the undesired [mobile homes'] possible effect on the neighborhood's home values as a whole. This testimony was not competent to support the denial of the special exception. *Compare Olson v. South Carolina Dept. of Health & Entl. Control,* 379 S.C. 57, 67, 663 S.E.2d 497, 502–03 (Ct.App.2008) (affirming an administrative law court's finding that the effect on the value of adjacent landowners' property warranted the denial of a dock permit because *those adjacent landowners* testified the desired permit would diminish the value of their respective properties); [735 S.E.2d 663] *Myrtle Beach Farms Co. v. Hirsch,* 304 S.C. 94, 96–97, 401 S.E.2d 196, 198 (Ct.App.1991) (reversing the denial of an injunction based upon a restrictive covenant and stating "Myrtle Beach Farms based its decision to withhold approval mainly on its opinion, which it was competent to make *as the owner of the surrounding property,* that the use of the subject property as a site for a helicopter ride service would have an adverse impact on the future marketability or desirability of the surrounding property" (emphasis added)).
>
> Additionally, none of the residents properly explained why Appellants' [mobile homes] would cause a decrease in property values when . . . [mobile homes are] located across the street from the property and [others] located nearby. The residents' testimony also failed to relate how their concerns about [mobile homes] would be different from their concerns regarding [other mobile homes] which would be allowed as a matter of right without the need to seek a special exception. No competent testimony was presented differentiating the effect of [mobile homes] on property values from the effect of a [condominium or duplex] on property values. Both of these types of business would be entitled to open in the same commercial location as a matter of right.

Regarding the residents' traffic concerns, we note that although there was testimony that residents felt the [mobile homes] would increase traffic, they failed to offer any competent [401 S.C. 151] evidence to support their opinions. See *Bannum v. City of Columbia*, 335 S.C. 202, 206, 516 S.E.2d 439, 441 (1999) (reversing a zoning board's denial of a special exception permit and holding that although neighboring residents testified they felt a proposed halfway house would increase traffic, there was no factual evidence presented to support that allegation). Multiple neighborhood residents provided accounts of problems exiting and entering the neighborhood at the location of the proposed [mobile home park]. However, this testimony failed to establish how adding the [mobile homes] would increase traffic problems in any way but a conjectural manner. Additionally, the [County's Planning Staff's] own traffic consultant determined the proposed [mobile homes] would not generate a significant amount of traffic.

As to the second criterion, the BZA determined the special exception was not in substantial harmony with the surrounding area. The record reflects the property is located within a [residential] district near another [mobile home park], and [a Church]. Although the BZA determined the [mobile home park] was in substantial harmony with these [residential] uses, the BZA found the [mobile homes] was not in substantial harmony with nearby residential developments. We find the BZA's decision to give deference to residential neighborhoods outside the [residential] zoning district in which the [mobile homes] would be located was arbitrary and capricious. Furthermore, as stated above, the record is void of any factual evidence to support the testimony that this particular [mobile home park] would have a detrimental impact on the character of the surrounding area.

Wyndham Enterprises v. City of North Augusta, 401 S.C. 144, 735 S.E.2d 659 (Ct. App. 2012)

At oral argument before the circuit court, the County attempted to distinguish this line of cases on the ground that they involved appeals from Boards of Zoning Appeals, quasi-judicial bodies, while this case involves a County Council's "legislative decision." The implication of this argument is concerning because the County seems to be arguing that while Boards of Zoning Appeals must be rational, elected officials can be irrational. If this were a correct statement, then courts would be reduced to so much office furniture. The opposite is true; the judiciary is the most important branch of the tripartite system of government: "Laws are a dead letter without courts to expound and define their true meaning and operation." Alexander Hamilton, *The Federalist* No. 22.

There are no policies, regulations, statutes, or caselaw justifying a lower degree of reason for a legislative body. *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4th Cir. 1995); *Purdy v. Moise*, S.C. 223 S.C 298, 75 S.E.2d 605 (1953) (City ordered to grant building permit for "tourist

court" in area zoned for "hotel.") Second, reason applies universally, whether the subject is law, medicine, or carpentry. Thus, as set forth above, while it may be a tautology to state that the issue—any issue—can be "debated," the question put before this Court on these facts is whether this record contains enough evidence to support the legislative decision as a rational conclusion, *i.e.* "fairly debatable." To be rational requires more than pure speculation. Monty Python, Jonathan Swift, Lewis Carroll, and ten thousand others have had a blast aping the form of rigid logical formalities rendering arguments to hilarity and holding a mirror of plausible sounding irrationality before us. (Q. How do you know she is a witch? A. She looks like one.) If the premise of complaining residents is a legally sufficient basis, "she looks like one," for the Council's refusal to rezone Appellant's parcel to be consistent with his adjoining R-3 parcel and with the County's Future Land Use Map, then the Comprehensive Plan and the County's Future Land Use Plan are subject to veto by any unhappy resident. Rather than turning the Court into a supervisory Zoning Board, the County goes the other direction and promotes disgruntled residents to a supervisory Zoning Board, and they make decisions without supporting facts or evidence. Then the question raised here as to whether the application for rezoning was "fairly debated" becomes a mere rhetorical question and an echo of Dick the Butcher's exhortation to his friends: "The first thing we do, let's kill all the lawyers." *2 Henry VI*, Act IV, Sc. 2, lines 76-77. As Dick the Butcher's friend, Jack Cade acknowledges: "Is not this a lamentable thing, . . . that parchment, being so scribbled over, should undo a man?" lines 78-81 Here, the complaining neighbors, with no evidence, undid the parchment, and by ignoring the legislative decision codified in the Comprehensive Plan and the Future Land Use Plan, the circuit court placed its imprimatur upon prejudice as a substitute for rationally based legislative decisions.

3) *Helicopter Solutions v. Hinde*, 414 S.C. 1, 776 S.E.2d 753 (Ct. App. 2015)

The Supreme Court decided *Bannum* in 1999, and the Court of Appeals decided *Wyndham* in 2012. Three years later, the Court of Appeals took up the same issue in another zoning case in Myrtle Beach with the same legal issue. Or, as the Court of Appeals said in *Wyndham*, decisions that are "not supported by competent, substantial, and material evidence, [but] was based on opinion and speculation testimony." *Wyndham Enterprises v. City of North Augusta*, 401 S.C. 144, 735 S.E.2d 659 (Ct. App. 2012) As discussed above, this Court in *Wyndham* summarized the "evidence" adduced against the applicant, which is identical to the "evidence" relied upon by Council here:

> Also, at the hearing, fourteen residents of nearby residential neighborhoods testified against the special exception. Residents' concerns included increased traffic, decreased property values, and a negative image of the community due to multiple [401 S.C. 147] fireworks retailers in the same area.

In order to evaluate whether such "evidence" was sufficient, the Court of Appeals relied on *Bannum*, and pointed out that while residents are entitled to be heard and entitled to express their opinions, statements to the Board about traffic or safety or property values must be based on something more than subjective, unsupported statements:

> Thus, because the BZA's decision was not supported by competent, substantial, and material evidence, and was based on opinion and speculation testimony, we reverse the circuit court's decision to affirm the BZA.

Thus, this Court reached the same conclusion for the same reasons expressed by it in 2012 and the Supreme Court in 1999, when complaining residents in Myrtle Beach protested the reclassification of the property owner's property to allow him to provide airborne tours. Like the neighbors in this case, and like the neighbors in *Bannum*, and in *Wyndham*, Hinde contended, **without evidence**, that the operation of the helicopter business injured him by diminishing his property values. He had nothing to support his opinion, which is the common link through all these cases with the case now before the Court. After the Board of Zoning Appeals sided with the neighbors and ordered the

business closed, the circuit court reversed the Board of Zoning Appeals, and the Court of Appeals affirmed the circuit court, holding:

> This court is prohibited from writing into an ordinance language restricting property rights to a greater degree than intended by the legislative body. It is a well-founded principle of law that statutes or ordinances in derogation of natural rights of persons over their property are to be strictly construed as they are in derogation of the common law right to use private property so as to realize its highest utility and should not be impliedly extended to cases not clearly within their scope and purpose. It follows that the terms limiting the use of the property must be liberally construed for the benefit of the property owner. *Purdy v. Moise*, 223 S.C. 298, 302, 75 S.E.2d 605, 607 (1953) (citations omitted); see also *Keane/Sherratt P'ship by Keane v. Hodge*, 292 S.C. 459, 465, 357 S.E.2d 193, 196 (Ct.App.1987) (holding that while "[l]ocal governments have wide latitude to enact ordinances regulating what people can do with their property," they "must draft their ordinances so that people can have a clear understanding as to what is permitted and what is not. Otherwise, we must construe such ordinances to allow people to use their property so as to realize its highest utility.") (footnote omitted). Thus, we find the circuit court properly held the Zoning Board made an error of law in construing the County Ordinance to exclude a helicopter sightseeing tour facility as a permissible use within the AC district.
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> *Helicopter Solutions v. Hinde*, 414 S.C. 1, 776 S.E.2d 753 (Ct. App. 2015)

Throughout this case the Respondent has asserted that no citizen has the right to demand a particular zoning. This is only partially true—every citizen has the right to demand to be treated rationally and fairly, but more importantly, Respondent's assertion is a mischaracterization of the appellant's case, a straw man. Appellant has never asked anything more than his two parcels be treated alike and in conformity with the County's legislative decision as expressed through its Comprehensive Plan, which it adopted after undertaking a thorough and rational examination of the area, which included an evaluation of traffic and safety. In other words, Appellant is demanding the County do nothing more than enforce its own ordinance. The holdings running through all these cases, including the cases cited in the quoted passages is the same; to wit, that while the neighbors are entitled to be heard, their unsupported objections cannot form the sole basis of a decision. In short, prejudice and speculation are insufficient to raise the debate to the level of "fairly debatable." This is a logical principle of law that the Court is required to apply to do justice and prevent the impairment

of rights motivated by nothing more than prejudice. Both the summary of Council's deliberation as well as the recorded video/transcript of that body demonstrates that Council failed to deliberate any of the facts, let alone "all of the facts" around a rezoning request to bring the subject parcel into conformity with adjacent parcel and in conformity with the County's legislative decision enacted in its Comprehensive Plan and Future Land Use Plan. In fact, the record reflects that Councilmember Newell not only insisted that he make the decision because the property is in his district, but also he made the motion to deny before anyone said a word. See Record on Appeal at page 255 [tr. Page 36] The circuit court's May 12, 2020 Order jettisons the Appellant's property rights in favor of appeasing barely disguised canards of complaining neighbors. It is the sole province of the Court to protect citizens' fundamental rights, and for this reason, the Appellant respectfully requests that the Court of Appeals examine the record and reverse the lower court's decision that the issue is "fairly debatable."

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, or, in the alternative, remand to the County Council with instructions to make specific findings of fact regarding the impact of the Appellant's request on traffic, safety, and any impact on property values.

Respectfully submitted,

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I certify that this Final Brief complies with Rule 211(b), *South Carolina Appellate Court Rules*.

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