THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

M. Dawes Cooke, Jr., Special Referee

RECEIVED
May 27 2021
SC Court of Appeals

Case No. 2017-CP-08-01088

Appellate Case No. 2020-001118

Todd Olds, Appellant

vs.

Berkeley County and Berkeley County Planning Commission, Respondents

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BRIEF OF RESPONDENTS

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STATUTES

S.C. Code Ann. § 4-9-25

S.C. Code Ann. § 6-29-710

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Art. 1.2 Berkeley County Zoning Ordinance

Berkeley County Zoning Ordinance 21.6

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STATEMENT OF ISSUES ON APPEAL

THE SPECIAL REFEREE PROPERLY RULED THAT THE DECISION OF COUNTY COUNCIL TO DENY PLAINTIFF/APPELLANT'S REZONING REQUEST WAS A PROPER EXERCISE OF ITS LEGISLATIVE PREROGATIVE.

THE SPECIAL REFEREE PROPERLY RULED THAT THE MATTER BEFORE COUNTY COUNCIL WAS FAIRLY DEBATABLE AND FAIRLY DEBATED.

STATEMENT OF CASE

This is a rezoning case. This matter began on January 24, 2017, when the Plaintiff/Appellant applied to Berkeley County to rezone a 1.1 acre parcel at 751 Royle Road from R-2 (residential mobile home) to R-3 (commercial mobile home).

At the time of his application, Mr. Olds had fifteen mobile homes on 749 Royle Road, a R-3 lot, and three (the record in some places says two) on 751 Royle Road, a R-2 lot. He sought to have both lots zoned R-3, which, if approved, would allow him to combine the two lots and have a total of twenty-seven mobile homes on them.

The County Planning Department considered the application and staff recommended approval of the rezoning request. The Planning Commission, after holding a public hearing, voted to recommend denial of the request. County Council, also after public hearings, subsequently voted to deny the request. The County Council votes were not unanimous.

Plaintiff/Appellant then filed the instant appeal to the Berkeley County Court of Common Pleas challenging the legality of County Council's refusal to rezone his property.

By Consent Order of Reference with Finality, the parties consented and agreed that M. Dawes Cooke, Jr. would serve as Special Referee to consider and rule on the single issue of whether the County's refusal to rezone Plaintiff/Appellant's property was arbitrary and capricious and contrary to South Carolina law.

From the pleadings, proceedings, filings, arguments of counsel and upon a joint record and following a hearing conducted on December 10, 2019, Special Referee Cooke issued his Order dated May 5, 2020, filed May 12, 2020 denying Mr. Olds' appeal. R.O.A. pages 5-24.

His analysis and his findings of facts are fully articulated in his Order and his conclusions of law are set forth therein as follows:

1. This court is possessed of jurisdiction over the parties and the subject matter;
2. Venue is proper;
3. Plaintiff has failed to meet his burden of proving that the legislative decision of County Council in denying his rezoning request was arbitrary and capricious or unreasonable;
4. While members of County Council are not required to announce the reasons for their votes, and the standards applicable to a vote by County Council are not governed by the same requirements as the BZA, there is sufficient evidence in the record of expressed concerns by members of Council about traffic, safety and quality of life which are legitimate and statutorily sanctioned legislative considerations;
5. While there are statements in the record made by members of the public in open session which were highly charged and emotionally based, there is no evidence in the record suggesting that any member of Council adopted, embraced, approved or sanctioned those comments or that the comments formed a basis for his/her vote;
6. There are statements in the record by members of the public in open session which are based on their personal observations and experiences and are directed to traffic, safety and quality of life concerns;
7. The Comprehensive Plan, while legislatively adopted, does not supplant the County zoning ordinances or preempt County Council's future legislative zoning decisions;
8. The matter before County Council was fairly debatable and was fairly debated;
9. County Council's decision to deny Plaintiff's rezoning request was and is a proper exercise of its legislative prerogative; and
10. The legislative decision by public vote of Council should not be upset or set aside; and
11. The parties have agreed that the Plaintiff's constitutional arguments are not before the undersigned for decision. Accordingly, I make no findings as to any constitutional issue, unless and except to the extent that constitutional issues are necessarily implicated in finding that County Council's legislative decision was not arbitrary or capricious. R.O.A. pages 23, 24.

Upon Plaintiff/Appellant's motion for reconsideration, Special Referee Cooke heard arguments of counsel, considered Plaintiff/Appellant's memorandum, Defendants' memorandum in opposition to the motion and Plaintiff/Appellant's reply. He denied Plaintiff/Appellant's motion by his Order on Motion For Reconsideration dated July 22, 2020 and filed July 23, 2020. R.O.A. pages 1-4.

STANDARD OF REVIEW

In an action at law, tried without a jury, the appellate court's standard of review extends only to the correction of errors of law. *Smith v. Auto-Owners Ins. Co.*, 377 S.C. 512, 660 S.E.2d 271 (S.C. Ct. App. 2008). The Court of Appeals will not disturb the trial court's findings of fact in an action at law tried without a jury, unless those findings are wholly unsupported by the evidence or controlled by an erroneous conception or application of the law. *Knox v. Bogan*, 472 S.E. 2d 43, (S.C. Ct. App. 1996), *Revis v. Barrett*, 321 S.C. 206, 467 S.E. 2d 460 (S.C. Ct. App. 1996).

The fact that the parties referred an action at law to special referee did not change the scope of review, when referee entered final judgment. *Bodiford v. Spanish Oak Farms, Inc.*, 317 S.C. 539, 455 S.E.2d 194 (S.C. App. 1995). In action at law tried by special referee, appellate review was limited to determination of whether there was any evidence reasonably tending to support special referee's findings. *Willms Trucking Co., Inc. v. JW Const. Co. Inc.*, 314 S.C. 170, 442 S.E.2d 197 (S.C. App. 1994).

FACTS

The facts in this case are straightforward, clear and largely undisputed. There was a rezoning request by Plaintiff/Appellant to County Council. He did not seek a variance through the Board of Zoning Appeals (BZA).

There was a process which took place at Berkeley County to consider his rezoning application. Multiple public hearings were conducted. People came out and spoke. Plaintiff/Appellant was the only citizen proponent of the zoning change. R.O.A pages 220-281.

In her presentation before the Land Use & Economic Development Committee of County Council on March 13, 2017, Planning and Zoning Director Alison Simmons testified as follows:

"... Planning Commission recommended denial in a unanimous vote after reviewing the requested change and hearing from many community stakeholders in opposition to the request. Planning Commission found the request incompatible and potentially detrimental in the context of the community concerned. Members of the community present verbalized concerns regarding traffic, saturation of mobile home parks in the area and the diminution of property values and quality of life..." R.O.A. page 8, page 79.

Special Referee Cooke reported in his Order excerpts of testimony and comments from the public meetings which include *inter alia*:

- Plaintiff/applicant spoke in support of his application. He stated that he intended to put a quality mobile home park on the property. He did not intend to put "trash" there. He would place security lighting, require vinyl siding, and improve the access road. He said he intended to own the mobile homes in the park except those that are already there. He stated that this would not be a "thug park." He would "vet" the people applying to live there and would have strict leases. He would allow the Sheriff to have full access. He stated that there is no crime in his North Charleston mobile home park. He intended this to be a quality park and provide affordable housing in accordance with the County's Comprehensive plan. R.O.A. page 9.
- There is an overabundance of mobile homes in the area. The property is too small for twenty-four mobile homes. He is concerned about children playing in the road. R.O.A. page 9.
- The area is saturated with mobile home parks. He is concerned about drug problems, traffic and children having no place to play. R.O.A. page 9.
- He does not want lights and trailers. Kids have come onto his property from the existing mobile home park and gotten into his swimming pool. R.O.A. page 9.
- She has had problems with kids in the mobile home park partying and coming across the fence onto her property. R.O.A. page 9.
- His property will not appraise for what it is worth because of the mobile homes nearby. Animals are neglected at the park. His wife stated that they have smelled meth being cooked there. R.O.A. page 9.
- In a couple of those (pictures) you will see it is high traffic on this road at certain times of day... And yes, I can say that I have put my house up for sale twice and was told by the real estate agent that because of the trailers next door and around in my area that the value of my real estate, I could not get what it would really be worth because it has depreciated ... There is a two and a half mile stretch from 17A to 78. It takes approximately twenty to twenty-two minutes to travel both ways or one way in heavy traffic time. We are posed with a major problem with the safety factor of those emergency vehicles going to and from. One person being trapped in a fire, losing one minute can cost him his life. R.O.A. page 9.
- Residents have been coming to the Planning Commission for years to protest applications to add more mobile homes, and the Planning Commission has consistently denied those applications. R.O.A. page 9.

- From the four way stop to my house is probably 800 yards, roughly, and it backs up every day. And I've got video standing on my front porch where they're stopped in the road waiting to get through. R.O.A. page 10.
- Traffic and everything on there around Sangaree School. You can't get there in the afternoons or in the mornings for people dropping or picking up kids there. They even park in the highway. You got to sit there and wait for them to get through before you can get through that intersection there around the school. Y'all need to come around there in the afternoons and see what kind of traffic we got on the road. R.O.A. page 10.
- My concern is about traffic, safety and children... That's a big concern right there... It comes to a tipping point to where you know you got carrying capacity on the road. You got to look at the safety. And that's the direction I'm coming from. Totally. He also stated that he has been down Royle Road many times. He has seen a "lot of stuff" going on in the area. It does devalue the property. R.O.A. page 10.
- I don't hear anyone saying mobile homes are a bad thing because you live there. However, I do hear concerns about traffic and safety of the residents and children. R.O.A. page 10.
- One resident stated that he had counted thirteen mobile home parks on Royle Road, containing 316 mobile homes. He also stated that eleven applications to add mobile homes had been denied since 2002. He also stated that he had put his house up for sale twice but his real estate agent told him that he can't get what the house is worth because of the mobile homes next to his property. He also complained about constant traffic and drug activity in the area. He complained about traffic safety, saying that he had seen someone hit by a car. R.O.A. page 10.
- One resident presented a petition signed by other neighbors opposing the application. R.O.A. page 10.

Plaintiff/Appellant and Respondents disagree on the meaning and consequence of the public statements. Plaintiff/Appellant attributes the propriety and best possible implications to his own words and the worst possible implications to those speaking in opposition. Respondents attribute the words of citizens spoken in a public forum as information, opinion, personal observations and general expressions of neighborhood sentiment, all received in the ordinary course by the public officials acting in their legislative capacity.

ARGUMENTS

I. BECAUSE THE SPECIAL REFEREE DETERMINED THAT A DECISION OF COUNTY COUNCIL TO DENY PLAINTIFF/APPELLANT'S REZONING REQUEST WAS A PROPER EXERCISE OF ITS LEGISLATIVE PREROGATIVE, HE PROPERLY DENIED THE APPEAL.

Special Referee Cooke correctly summarized in his Order well-settled law in South Carolina…"Zoning is a legislative act which will not be interfered with by the courts unless there is a clear violation of citizen's constitutional rights. In order to successfully assault a city's zoning decision, a citizen must establish that the decision was arbitrary and capricious. *Byrd, et al v. City of North Augusta*, 261 S.C. 591, 201 S.E. 2d 744 (1974), *Knowles v. City of Aiken,* 305 S.C. 219, 407 S.E. 2d 639 (S.C. 1991)". R.O.A. page 10.

"The governing bodies of municipalities clothed with authority to decide residential and industrial districts are better qualified by their knowledge of the situation to act upon these matters than are courts, and their decisions will not be interfered with unless there is a plain violation of the constitutional rights of citizens." *Harbit v. City of Charleston,* 382 S.C. 383, 675 S. E. 2d 776 (S.C. Ct. App. 2009). Mr. Cooke went further in his Order:

> Citing *Knowles,* "Courts cannot become city planners, but can only correct injustices when they are clearly shown to result from municipal action."
>
> "In the context of a zoning action involving property, it must be clear that the state's action has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense. *Sylvia Dev. Corp. v. Calvert County*, 48 F. 3d 810, 827 (4th Cir. 1995) (quoting *Nectow v. Cambridge*, 277 U.S. 183, 187-88, 48 S. Ct. 447, 73 L. Ed. 842 (1928))." *Dunes West Golf Club, LLC v. Town of Mt. Pleasant*, 401 S.C. 280, 737 S.E. 2d 601 (S.C. 2013).

After a thorough and detailed analysis and summary of the arguments of the parties and based upon his findings of fact, Mr. Cooke observed in his Order:

> "My conclusion is best summarized by the following statement: "While the landowner here…do[es] not embrace this choice of zoning, other residents in close proximity applaud this zoning. **While the landowner may not agree and may be able to convince this Court not to agree with the City's [County's] zoning choice, that is not the issue before [me]. I cannot insinuate [my] judgment into a review of the City's [County's] decision… Based on the foregoing considerations, I find that Plaintiff has not met his burden of proving that the Defendants' legislative action was arbitrary and capricious…**" (emphasis added) R.O.A. page 17.

In other words, zoning and rezoning is up to the local legislative body. Courts should avoid second-guessing the legislative decisions of the local elected officials. A footnote in *Bear*

Enterprises v. Greenville County, 319 S.C. 137, 459 S.E. 2d 883 (1995) sums up this key point well:

> "We note that Bear deposed Council members and presented their testimony as evidence to support Bear's argument that Council's decision was arbitrary. We are aware of no authority allowing someone challenging action by Council to interrogate members individually to impeach Council's decision. The governing body of a municipality acts as a collective body, not as individuals, and decisions made in this fashion are the product of debate and compromise. **If individuals are not satisfied with decisions made by members of a municipal government within the limits of the law, their remedy is at the polls, not the courts**. Although we feel it was inappropriate to examine Council members in this manner, the County did not object to the procedure in this case." (Emphasis added).

In his argument before the Special Referee, Plaintiff/Appellant relied, and in his Brief he continues to rely heavily on three cases, each of which is an appeal from a decision of the local Board of Zoning Appeals or its equivalent, *Bannum, Inc. v. City of Columbia*, 335 S.C. 202, 516 S.E. 2d 439 (1999), *Wyndham Enterprises, LLC v. City of North Augusta*, 401 S.C. 144, 735 S.E. 2d 659 (Ct. App. 2012) and *Helicopter Solutions, Inc. v. Hinde*, 414 S.C. 1, 776 S.E. 2d 753 (Ct. App. 2015).

Plaintiff/Appellant persists in his mistaken insistence that the cited cases, all from a local BZA decision, pertain to Mr. Cooke's orders and this appeal[1]. He is comparing "apples and oranges". Respondents forcefully argued that an understanding and application of the distinction is essential to the trial court's consideration of the merits of the case and it continues to be essential in review of his decision by this Court. R.O.A. pages 299-341.

It is true, that if this was an appeal from a Berkeley County Board of Zoning Appeals, which it is not, then just as in the three cited cases above, the county's ordinance regarding

[1] It is telling that in the Conclusion to his Brief, Plaintiff/Appellant asks this Court to reverse Mr. Cooke's Order and ... "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."

decisions of the board of zoning appeals would govern. The applicable Berkeley County BZA ordinance reads:

> "Berkeley County Zoning Ordinance 21.6. - Decisions of the board of zoning appeals. All final decisions and orders of the board must be in writing and be permanently filed as a public record. All findings of fact and conclusions of law must be separately stated in final decisions or orders of the board, which must be delivered to parties of interest by certified mail." R.O.A. page 15, footnote 3.

The County's ordinance recognizes the quasi-judicial nature of the BZA proceedings (thus the necessity of writing out its findings of facts and conclusions of law) versus legislative proceedings conducted by County Council for which there is no corresponding requirement in law or in practice. It would be untenable to hold a legislative body to such a standard.

Special Referee Cooke recognized the distinction and its materiality. He specifically addressed the difference in his Order:

> "I agree that there is a distinction between judicial appellate review of an administrative decision and judicial scrutiny of a legislative decision. A legislative body is not expected to make an evidentiary record or to articulate the bases for its decisions as would stand up to judicial appellate review. Rather—as the above-cited case law holds—legislative actions must be upheld if there is even a fairly debatable basis to support them." R.O.A. page 16.

II. BECAUSE THERE IS AMPLE EVIDENCE IN THE RECORD TO SUPPORT THE SPECIAL REFEREE'S CONCLUSION THAT THE MATTER WAS FAIRLY DEBATABLE AND FAIRLY DEBATED, HIS DECISION SHOULD NOT BE DISTURBED.

The "**fairly debatable**" test has long been the measure in South Carolina as to whether a local government's zoning decision will withstand a challenge as arbitrary and capricious. There is a long line of reported cases establishing and affirming the test.

In *Bear Enterprises v. Greenville County*, 319 S.C. 137, 459 S.E. 2d 883 (1995), our Supreme Court chose not to invalidate Greenville County's refusal to rezone Bear's property

from residential-suburban to resident-mobile home park concluding that the County's decision was "fairly debatable".

"It is not the prerogative of the courts to pass upon the wisdom of County Council's decision; rather, the controlling inquiry is whether County Council's refusal to change the zoning of Bear's property is so unreasonable as to impair or destroy Bear's constitutional rights. If the propriety of the Council's decision is even 'fairly debatable' we cannot inject our judgment into a review of their decision, but must leave that decision undisturbed". *Rushing v. City of Greenville,* 265 S.C. 285, 217 S.E.2d 797 (1975) (the action of a municipality regarding the rezoning of property will not be overturned by a court if the municipality's decision is "fairly debatable" because the municipality's action is presumed to have been validly exercised, and because it is not the court's prerogative to pass upon the wisdom of the municipality's decision). Only where the municipality's action is "so unreasonable as to impair or destroy constitutional rights," *Rush v. City of Greenville,* 246 S.C. 268, 276, 143 S.E.2d 527, 531 (1965), will the courts declare the municipality's action unconstitutional." The burden of proving the invalidity of a zoning ordinance is on the party attacking it; thus, it is incumbent upon Bear to show by clear and convincing evidence the arbitrary and capricious nature of the ordinance. *Town of Scranton v. Willoughby,* 306 S.C. 421, 412 S.E.2d 424 (1991).

We find the Council's decision to deny Bear the right to place 211, as opposed to 30 to 35 mobile homes, on its property "fairly debatable." Bear has not demonstrated by clear and convincing evidence that Council acted arbitrarily or capriciously. Moreover, there was no taking, as Bear acknowledges its property still has a beneficial use to which it can be put. A legislative body does not deny due process simply because it does not permit a landowner to make the most beneficial use of its property. *Hampton v. Richland County,* 292 S.C. 500, 357 S.E.2d 463 (Ct.App.1987) (a property owner is not entitled to have his property zoned for its

most profitable use); *Ohoopee Land Dev. Corp. v. Mayor & Council of Wrightsville,* 248 Ga. 96, 281 S.E.2d 529 (1981) (a zoning classification is not unconstitutional simply because a developer is deprived of a more profitable use of his property).

Lenardis v. City of Greenville, 316 S.C. 471, 450 S. E. 2d 597 (Ct. App. 1994) was another rezoning case. Pursuant to an order of reference for final judgment with direct appeal, the master ordered the defendant city to rezone the plaintiff's property from office use to commercial use.

Reversing the master, this Court held: "Rezoning is a legislative matter. The decision of the legislative body is presumptively valid, and the property owner bears the burden of proving otherwise. *Rushing v. City of Greenville,* 265 S.C. 285, 217 S.E.2d 797 (1975); *Rush v. City of Greenville,* 246 S.C. 268, 143 S.E.2d 527 (1965). The governing bodies of municipalities clothed with authority to determine residential and industrial districts are better qualified by their knowledge of the situation to act upon such matters than are the courts and they will not be interfered with unless there is a plain violation of the constitutional rights of citizens. *Rush,* 143 S.E.2d at 531. It is not the prerogative of the court to pass upon the wisdom of the decision. *Rushing,* 217 S.E.2d at 799. The controlling inquiry is whether City Council's refusal to change the zoning of the owner's property is so unreasonable as to impair or destroy the owner's constitutional rights. *Rushing,* 217 S.E.2d at 799. We cannot insinuate our judgment into a review of the City Council's decision, but must leave that decision undisturbed if the propriety of that decision is even "fairly debatable." *Knowles v. City of Aiken,* 305 S.C. 219, 407 S.E.2d 639 (1991). We find that City Council's decision to hold the line on commercial development in the area and protect its residential nature was fairly debatable and was not unreasonable.

In *Harbit v. City of Charleston*, 382 S.C. 383, 675 S.E. 2d 776, (Ct. App. 2009), Mr. Harbit, an owner of property located at 7 Wesley Drive, applied for rezoning of the property based on its location within the Savannah Highway Overlay Zone. The Zone was created as a result of a

comprehensive study of land surrounding the Ashley River Bridge in Charleston. Based on this study, the City developed the "Ashley Bridge District" plan, which identified the need to maintain residential communities in the Zone, despite increased commercialization. While highlighting the need to maintain residential uses in the Zone, the plan allows certain properties along Savannah Highway and Wesley Drive to be used for limited commercial purposes, including professional office use. Under the Ashley Bridge District plan, the other properties on the owner's side of Wesley Drive within the Zone had been rezoned for limited commercial use.

The City of Charleston Planning Commission reviewed the owner's application, at which time the owner's counsel presented his position for rezoning the Wesley Drive property. The Planning Commission, however, voted to recommend denying the rezoning application. Charleston City Council received the Planning Commission's recommendation and held a public hearing to address Harbit's application. City Council denied Harbit's request.

After City Council's denial of his application, Harbit appealed the zoning decision to the circuit court and asserted additional grounds for relief, including causes of action for due process and equal protection violations. The City filed a motion for summary judgment on all claims, which the circuit court granted. Harbit appealed. The Court of Appeals was not persuaded by Harbit's assertion that City Council's refusal to rezone Harbit's property was so unreasonable that the appellate Court should invalidate City Council's decision. The Court affirmed the lower court and restated well-settled law in South Carolina: "We find that City Council's decision is fairly debatable....While all of the residents' concerns might not be well-founded, City Council's response to public opposition does not rise to the level of a constitutional violation. *See* *Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach,* 420 F.3d 322, 329 (4th Cir.2005) (in finding the state court of appeals' decision was not res judicata of the developers' § 1983 due process and equal protection claims, the Fourth Circuit Court of Appeals determined the city council's

improper denial of the zoning application in response to public opposition did not rise to the level of a constitutional violation because "matters of zoning are inherently political, and it is a zoning official's responsibility to mediate disputes between developers and local residents").

Additionally, City Council specifically cited the unique location of Harbit's property as opposed to other properties on Wesley Drive that were zoned for limited commercial use, noting that two of its sides are situated on the interior of the neighborhood. Moreover, because it is a corner lot, the property effectively serves as a buffer between the heavier-traveled Wesley Drive and the purely residential Stocker Drive. *See* Hampton v. Richland County, 292 S.C. 500, 503, 357 S.E.2d 463, 465 (Ct. App.1987) (finding the city council's refusal to rezone property from an office and industrial classification to a general commercial classification was "fairly debatable" because the property lay between commercial and residential properties thus creating a buffer between the two zones).

While other similarly situated properties on Wesley Drive are zoned for limited commercial use, the record does not indicate that Harbit was the subject of purposeful, invidious discrimination. Sylvia Dev. Corp. v. Calvert County, Md., 48 F.3d 810, 825 (4th Cir.1995) (internal citations omitted) ("If disparate treatment alone were sufficient to warrant a constitutional remedy, then every blunder by a local authority, in which the authority erroneously or mistakenly treats an individual differently than it treats another who is similarly situated, would rise to the level of a federal constitutional claim.").

"Based on the evidence in the record, the City properly denied Harbit's rezoning application in an effort to hold the line on commercial development in the area and protect its residential nature. We will not invalidate City Council's decision as its propriety is at least "fairly debatable" based on the facts and is not "so unreasonable as to impair or destroy constitutional rights." *See* Knowles, 305 S.C. at 224, 407 S.E.2d at 642. As such, it is not this

Court's function to pass upon the wisdom or expediency of City Council's decision. *See Bob Jones Univ., Inc.*, 243 S.C. at 360, 133 S.E.2d at 847.

Special Referee Cooke properly applied the "fairly debatable" test in his Order:

> "I find that the Plaintiff made a compelling argument to the County in favor of his rezoning application and the Planning staff agreed with his argument. Plaintiff credibly promised to improve the overall character of the properties, which already contain mobile homes. The number of mobile homes that he proposed to add was very small compared to the number of mobile homes already on Royle Road. Plaintiff correctly pointed out that his proposal to increase availability of affordable housing was consistent with the County's Comprehensive Plan. On the other hand, not all reasons advanced in opposition to Plaintiff's application can be labeled unsupported, pejorative speculation. To be sure, some of the public comments made in opposition to Plaintiff's application were intemperate and unsupported by empirical evidence. Yet, legislative action or inaction must not be judged by the least compelling arguments advanced to support it. Plaintiff himself told the Planning Commission that the proposed mobile home park would not be "trash" or a "thug park". It would be unfair to Judge the County's legislative decision because of public comments—however pejorative, uninformed and speculative—that were made in that same vein. Further, neighbors' fear 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 those social problems would be minimal in comparison to existing burdens. **However, evidence in the record suggests that the residents in the 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... I cannot insinuate my judgment into a review of the City's [County's] decision. Rather I must leave the City's [County's] decision undisturbed if the propriety of that decision is even 'fairly debatable'".** (Emphasis added). R.O.A. pages 16.17.

Mr. Cooke found and concluded on the matter of the County's Comprehensive Plan:

> "The Comprehensive Plan does have the force of law, since it was formally adopted by Ordinance. Nevertheless, nothing in the Plan suggests that it was intended to dictate future zoning classifications for specific parcels of property. Indeed, the Plan itself is subject to review and revision every five years, so it cannot have been intended to decide all future zoning questions. That the Plaintiff's application to rezone his property was consistent with the Comprehensive Plan is certainly a strong point in his favor. **However, it is not enough to overcome his extremely high burden of proving that the merits of Council's legislative decision are not a least fairly debatable."** (Emphasis added). R.O.A. page 23.

Special Referee Cooke addressed again the "fairly debatable" test again as applied to the matter before him on motion for reconsideration:

> "To be sure, substantial evidence supported by Plaintiff's application to rezone 751 Royle Road and some of the reasons that citizens advanced in opposition to the request were canards. However, as I stated in my original Order it would be unfair to judge a legislative decision by the least persuasive arguments advanced to support it. Some of those who spoke against the measure expressed genuine and rational concerns about the negative effects that rezoning the property would have. Councilman Jack Schurlknight said, "My concern is about traffic, safety and children"… "That's a big concern right there." He also said, " It comes to a tipping pint to where you know you got carrying capacity on the road. You got to look at safety. And that's the direction I'm coming from. Totally." Council Chairman William Peagler said, "I don't hear anyone saying mobile homes are a bad thing because you live there. However, I do hear concerns about traffic and safety of the residents and children." **Considering the record as a whole, I am compelled to conclude that it is at least fairly debatable whether increasing 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 similar requests in that area."** (emphasis added) R.O.A. page 3, 4.

There can be no serious contention based on the full and ample record before the Special Referee that the matter before County Council was not fairly debatable and fairly debated.

CONCLUSION

Based upon the foregoing, the Orders of Special Referee Cooke should be **AFFIRMED.**

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I CERTIFY THAT THIS Final Brief complies with Rule 211(b), South Carolina Appellate Court Rules.

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May 27, 2021

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
May 27 2021
SC Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

M. Dawes Cooke, Jr., Special Referee

Case No. 2017-CP-08-01088

Appellate Case No. 2020-001118

Todd Olds, Appellant

vs.

Berkeley County and Berkeley County Planning Commission, Respondents

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PROOF OF SERVICE

I certify that I have served the Respondents' Brief on the Appellant, Todd Olds, by depositing a copy of it in the United States mail, postage prepaid on May 27, 2021, addressed to his attorney of Record, Thomas R. Goldstein, Esq., PO Box 71121, North Charleston, SC 29415 and by e-mail.

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May 27, 2021

Hon. Jenny A. Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Todd Olds v. Berkeley County, et al
Case No. 2017-CP-08-01088
Appellate Tracking Number: 2020-001118

Dear Ms. Kitchings:

Please find enclosed herewith for filing Respondents' Final Brief along with Proof of Service in the above.

Thanking you in advance for your usual courtesies, I am,

Sincerely yours,

John S. West

(w/enclosures as stated)

Cc: Thomas R. Goldstein, Esq.
John O. Williams, II, Esq.
(w/enclosures)