STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE Frances Baty, Helene Lambert, Michael Evatt, O.D. Strickland, Keith Godfrey, Bonnie Spearman, Allison Morton, Brian Morton, Janet Lamb, Henry Lamb, Appellants, vs. Greenville County Planning Commission, Mark III Properties, LLC Respondents.	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT CASE NUMBERS: 2021-CP-23-01494 2021-CP-23-01501 **ORDER DENYING APPEAL**

This matter comes before the court for hearing of the appeal filed by the above captioned Appellants of a decision of the Greenville County Planning Commission ("Planning Commission"). J. J. Andrighetti of Culbertson Andrighetti, LLC represents the Appellants. Christopher R. Antley of Devlin & Antley, P.A. represents the Planning Commission. Bruce W. Bannister, Luke A. Burke and Marcelo Torricos of Bannister, Wyatt, and Stalvey, LLC represent Mark III Properties, LLC ("Mark III").

FACTS/PROCEDURAL HISTORY

This is an appeal of the Planning Commission's decision to approve an application for preliminary approval of a subdivision named Cottonwood Ridge, Subdivision File Number PP-2021-002, C.A. No. 2021-CP-23-1494 ("Cottonwood Ridge") and an application for preliminary approval of a subdivision named Cloverdale Hills, Subdivision File Number PP-2021-013, C.A. No. 2021-CP-23-1501 ("Cloverdale Hills"). The Appellants filed these appeals pursuant to the South Carolina Local Comprehensive Planning Enabling Act of 1994.

In January of 2021, Mark III submitted to the Planning Commission two applications for preliminary approval of two subdivisions: a 459-lot subdivision (Cottonwood Ridge) and a 63-lot subdivision (Cloverdale Hills). At the Planning Commission's February 2021 meeting, several individuals and entities, including one of the Appellants, spoke in opposition to the proposal. They expressed concern over traffic hazards and other environmental problems that could result from the subdivision, as well as the incompatibility of the subdivision with the surrounding rural community. Mark III's engineer and the County's Planning Department Staff also addressed the Planning Commission at this meeting. Among the evidence presented were a Traffic Impact Study, slides and commentary concerning nearby neighborhoods that have higher density than Cottonwood Ridge and Cloverdale Hills, and drawings and commentary from engineers generally showing how both subdivision plans were dealing with environmental conditions on the proposed sites. The Planning Commission voted to accept the recommendation of the Planning Department Staff to conditionally approve Mark III's applications.

The Planning Commission sent notice of its decision to conditionally approve Cottonwood Ridge and Cloverdale Hills to Mark III on March 8, 2021. Appellants filed their Notice of Appeal on March 26, 2021. Mark III filed its Response to Appeal on April 6, 2021. The Planning Commission filed its Response to Appeal on April 28, 2021. Prior to the hearing held before this court on June 23, 2021, four former appellants withdrew their appeals, and their names have been removed from the case caption above. Finally, prior to the hearing held before this court on June 23, 2021, all parties filed pre-hearing briefs.

STANDARD OF REVIEW

The standard of review in an appeal of a decision of a planning commission is abuse of discretion. *Peterson Outdoor Advertising v. City of Myrtle Beach*, 327 S.C. 230, 235, 489 S.E.2d

630, 633 (1997). However, the circuit court must uphold the planning commission's decision if there is *any evidence* to support it. *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 173, 656 S.E.2d 346, 351 (2008) (emphasis added). The circuit court must refrain from substituting its judgment for that of the planning commission, even if the court disagrees with the decision. *Restaurant Row Assocs. v. Horry County*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999).

LAW/ANALYSIS

After a careful review of the pleadings, the record on appeal, the briefs of the parties, and arguments of counsel, the court DENIES the Appellants' appeal and AFFIRMS the decision of the Planning Commission to conditionally approve the subdivisions in question for the reasons set forth below:

I. *The record contains, at minimum, some evidence that supports the Planning Commission's decision to approve the plan under the LDR 3.1 standards.*

Appellants argue that the Planning Commission failed to adhere to provisions of the County's Land Development Regulations ("LDR") Rule 3.1 by failing to consider (1) the surrounding land use density and (2) environmental impacts. Respondents argued that LDR 3.1 does not apply to these subdivisions because they are unzoned areas.

The Court finds that the Respondents' argument about the inapplicability of LDR 3.1 is not properly before this Court and therefore makes no determination on that issue. If LDR 3.1 applies, the court rejects the Appellants' principal argument that the subdivisions do not meet LDR 3.1 density requirement because the "surrounding area is composed of large rural lots ranging in size from 1.7 to 104 acres." Among the information provided to the Commission was evidence that at least four nearby developments (which were also shown on slides viewed by the Commission at

the meeting) are denser than the proposed Cottonwood Ridge and Cloverdale Hills. Additionally, Cottonwood Ridge is in the mixed-use area of the Comprehensive Plan where the recommended density is 6-20 units per acre. Cottonwood Ridge contains 2.5 units per acre with 45% of the property designated for non-development use like green spaces and common areas. All of this was brought to the attention of the Planning Commission. As such, the record contains some evidence that the proposed subdivisions are consistent with the surrounding land use density.

Additionally, the court rejects the Appellants argument that the record is devoid of evidence in regard to environmental impacts. The Planning Commission considered evidence that supports a finding that the proposed subdivisions are compatible with the sites' environmental conditions. Appellant Frances Baty and her family members submitted multiple emails with concerns about the effects on wildlife, wetlands, and storm water management. Upstate Forever also submitted concerns regarding a wetlands mitigation bank at least half a mile away from the site. Further, the civil engineer for the project showed the Commission that they had designed a buffer around wetlands on the site and explained that they had ideas for alternative uses for areas that would affect the floodplain. Mark III also noted it was protecting substantial wetlands and greenspace as part of the project, and County personnel informed the Commission that substantial protections exist for environmental concerns that will be addressed after the preliminary subdivision approval stage.

The Appellants' argument concerning compatibility with the sites' environmental conditions boils down to a dispute about the quality of the evidence presented and the weight that the Commission should have given it. However, an engineer provided the Commission with *some evidence* to support a finding that the subdivisions are compatible with the sites' environmental conditions and flooding, and this appeal is not the forum for debating whether the Commission

should have required more robust evidence. *See Restaurant Row Assocs.*, 335 S.C. at 216, 516 S.E.2d at 446. Discussing the evidence and deciding to vote for or against approval based on the evidence presented is within the broad discretion conferred on the Planning Commission, and the Court rejects the Appellants' argument concerning environmental conditions and upholds the Commission's approval.

Therefore, the Planning Commission considered the evidence presented and found that the subdivision is compatible with the surrounding environmental conditions.

II. *The traffic study submitted by Mark III complied with the LDR.*

The Appellants contend that this court should reverse the Planning Commission's approval of the Cottonwood Ridge subdivision application because the Commission considered a Traffic Impact Study that included traffic count data that was more than 12-months old from the subdivision application filing date. The court disagrees.

The Planning commission argued that the Appellants failed to preserve this issue for appellate review, but the Court finds that the Appellants had referenced this issue in the underlying hearing and it has been preserved for appeal and properly before this Court.

But the Court disagrees with Appellant that the traffic study as presented violated the County's LDR. Among the materials submitted for the Planning Commission's review was a Traffic Impact Study dated January 2021 by traffic engineers Ramey Kemp & Associates expressly for the proposed Cottonwood Ridge subdivision. The report includes the following traffic counts:

A. Hwy 86 @ Old Pelzer Road – 5/14/2019

B. Old Gunter Rd @ Hwy 86 – 12/15/2020

C. Old Pelzer Rd. @ Emily Ln. – 12/15/2020

In addition, the traffic engineers noted:

> For the intersection of SC 86 & Old Pelzer Road, the 2019 counts previously conducted were utilized which was grown to 2021 using an annual growth rate of 4%.
>
> Traffic counts collected in 2020 were modified to account for the impact of COVID-19. The counts taken in 2020 were compared to the SC 86 & Old Pelzer Road 2019 counts provided and raised to reflect the counts taken in pre-Covid conditions. The raw and adjusted 2021 traffic volumes are shown in Figure 6 and 7. Additional data are provided in Appendix B, including a diagram of the raw traffic counts collected.

In addition to the counts, the traffic engineers calculated counts for 2021 using methods that went unchallenged at the Commission meeting. Nonetheless, the Appellants argue that the traffic study should have been thrown out because it violated LDR § 9.2(C), which states, in part:

> Existing Conditions
>
> Provide a description of existing traffic conditions including existing peak-hour traffic volumes adjacent to the site and levels of service for impacted intersections in the vicinity. Use existing signal timings and AM/PM peak hour counts unless otherwise determined (i.e. school or special events). *Data should reflect maximum usage periods for seasonal and daily variations. Existing counts may be used that are no more than 12 months old.*

LDR § 9.2(C) (emphasis added). The Appellants contend that the traffic counts in the report are more than 12 months older than the date of the subdivision application. The Appellants, however, misunderstand what LDR § 9.2(C) is referring to. The traffic counts included in the traffic study were counts done specifically for the Cottonwood Ridge and Cloverdale Hills projects. The counts were not sets of *existing* counts that were available from the SCDOT or third parties who may have traffic count data sets. Certainly, the traffic engineers could have sought existing data sets rather than create their own for this project – and if they had, LDR

§ 9.2(C) might have applied – but since they performed their own counts with no reliance on *existing* counts from other parties, LDR § 9.2(C) does not apply.

In addition, even if Section 9.2(C) were applicable, the traffic counts were current, either through the actual date of the count or through engineering calculation methods that updated the counts to 2021. The subdivision applications were filed on January 4, 2021. Focusing on the actual physical traffic counts in the study, only the Hwy 86 @ Old Pelzer Road traffic count occurred more than 12 months before the filing of the subdivision application. The remaining counts occurred on 12/15/2020, less than a month before the filing date. In addition, all counts were subjected to engineering calculations that brought them current to 2021 and, for the ones conducted in 2020, that accounted for the drastic change in traffic caused by the Covid-19 pandemic. The Planning Commission had ample evidence to support its decision.

Finally, the Appellants' focus on the dates of the traffic counts suggests that the Commission could not consider other portions of the traffic study when deciding whether to vote in favor of a *preliminary* approval of the subdivision. Nothing in the LDR prohibits the Commission's consideration of a traffic study because the traffic count section includes data that is over a year old. Nothing in the LDR prohibits the Commission from exercising its considerable discretion to decide how to weigh the traffic count evidence based on its age. It is evident to the Court that the Planning Commission considered the condition set by SCDOT upon Mark III to add turn lanes to Hwy 86 even though the original counts were from 2019, adjusted by 4%, and made current to 2021. The Planning Commission had the discretion to move forward with the data in the existing report.

A court cannot substitute its own judgment for that of the Commission's. In this particular instance, the Commission's approval is a preliminary approval and allows a proposed

subdivision to move to the next step. Other departments within the County and other governmental agencies, such as the Department of Transportation, still determine whether the traffic regulations are met as the subdivision attempts to move forward. The Commission is not tasked with a detailed review of the traffic impact – otherwise, the standard of review would be more stringent than the any evidence standard that this Court must apply. Given the ample evidence discussed above, the any evidence standard of review has been satisfied, and this court affirms the Planning Commission's approval of the neighborhoods.

III. *The Planning Commission properly considered and approved Mark III's request for a variance.*

The Appellants next argue that the Planning Commission improperly granted Mark III's request for variance in support of Cloverdale Hills. The court disagrees and finds that there was sufficient evidence in the record to support the Planning Commission's decision. LDR 8.8.1(A) states:

> Any subdivision of more than 30 lots or 50 single family attached dwellings shall provide at least two access points, the second may consist of an emergency access. If the configuration of the property does not allow for a secondary access, the paved surface of the main road shall be at least 26 feet wide to the first intersection.

Mark III requested a variance in compliance with LDR 8.8.1(A) proposing to increase the width of the access road to 26 feet because the configuration of the property does not allow for secondary access due to the flood plain, topography, and other existing conditions. Chief Sutherland (Fire Chief of South Greenville Fire District) reviewed the variance request and provided the following statement to the Planning Commission by email:

> I have talked to the developer and Chief Wallace at Piedmont Fire Department, and we are all in agreement that this variance is the best was to approach this scenario. With the subdivision being surrounded by a flood plain and then split at the creek, I feel that this is the only way to accommodate.

As this statement by Chief Sutherland and Mark III's explanation in support of the variance were the only evidence before the Planning Commission, the Planning Commission properly considered the evidence and granted the variance. Further, the Appellants failed to preserve this issue on appeal.

IV. *The Appellants were afforded due process.*

The Appellants next argue that the Planning Commission failed to provide them due process because (1) the Planning Commission afforded Mark III the opportunity to address the Planning Commission in person rather than by video conference and (2) provided Mark III additional opportunity to address the Planning Commission and did not offer the Appellants the same opportunity. The Court disagrees.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution." *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). "The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." *Id.* The Appellants argument that they were denied due process fails because the Appellants had a meaningful opportunity to be heard: they were afforded the process that was due to them, even if that opportunity was via video conference rather than in-person.

Additionally, the Appellants argument fails because (a) Article IV, Section 2 of the Planning Commission's Bylaws specifically grants the Chairman discretion to "set or limit" each side's opportunity to be heard and (b) even if Article IV, Section 2 did not exist, the Appellants were given due process as they were given a meaningful opportunity to be heard. The Court finds that the Appellants' argument is more indicative of a dissatisfaction with their meaningful

opportunity to be heard. However, due process does not require a trial-type hearing in every conceivable case of government impairment of a private interest. *First Fed. Say. Loan Ass'n of Walterboro v. Bd. of Bank Control*, 263 S.C. 59, 65, 207 S.E.2d 801, 804 (1974) (quoting *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 894 (1961)). Rather, due process is flexible and calls for such procedural protections as the particular situation demands, which is what occurred in this matter. *S.C. Dep't of Soc. Sens. v. Wilson*, 352 S.C. 445, 452, 574 S.E.2d 730, 733 (2002). In the end, due process requires that an applicant receive notice and an opportunity to be heard *at some point* before the Commission makes a final decision, but not at each level of the subdivision decision process. *See Ross v. MUSC*, 328 S.C. 51, 68, 492 S.E.2d 62, 71 (1997) (emphasis added). Here, the Appellants were afforded the opportunity to submit written arguments to present their positions, which some did. In addition, they were allowed to speak at the February 24, 2021 Planning Commission meeting to present arguments, which some did. The Appellants had ample opportunity to provide as much or as little information to the Commission as they saw fit.

Additionally, although open discussion was allowed by the Chairman, none of the members of the Planning Commission raised a point of order or objected to these discussions taking place. [RONR] (11th ed.) pp. 247 – 255]. The Planning Commission is competent to determine whether its rules have been obeyed, and this court should not second-guess that determination where no member of the Commission objected at the meeting. *See Turbeville v. Morris*, 203 S.C. 387, 26 S.E.2d 821 (1943) (holding that a court should not tell an ecclesiastical body how to conduct its deliberations under its own rules).

The Court also agrees that to establish a procedural due process claim, the Appellants must demonstrate that the alleged deprivation caused them substantial prejudice. *Tall Tower, Inc. v.*

S.C. Procurement Review Panel, 294 S.C. 225, 233, 363 S.E.2d 683, 687 (1987). The Appellants have not done so. Because they were afforded the opportunity to submit written materials and documents prior to the meeting and were afforded time to address the Commission in an oral presentation, the Appellants were able to present to the Commission information on all issues. If the developer was given more speaking time because commissioners had direct questions for the developer, it did not block the Appellants from submitting written materials. In addition, had the Appellants felt this issue harmed them, the Appellants had the ability to seek a reconsideration under the Planning Commission's by-laws, which they did not do. These facts cannot support a finding of prejudice, much less the substantial prejudice that would support a procedural due process claim.

Appellants due process rights were honored, and the court denies their appeal on this ground. Additionally, even if the Planning Commission had failed to provide the Appellants with adequate due process, the Appellants failed to preserve this issue on appeal.

V. *The Respondents' Standing Challenge.*

Mark III and the Planning Commission challenged the Appellants' standing to pursue this appeal on the grounds that the Local Comprehensive Planning Enabling Act does not confer standing on them. Based on the decision by the South Court of Appeals in *Citizens for Quality Rural Living, Inc. v. Greenville County Planning Comm'n*, 426 S.C. 97, 825 S.E.2d 721 (Ct. App. 2019), the Court finds that the Appellants have standing to proceed in this matter.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Appellant's appeal is DENIED and the Planning Commission's decision is AFFIRMED.

IT IS SO ORDERED.

[Judge Gravely's E-signature to follow]

Greenville Common Pleas

Case Caption: Frances Baty , plaintiff, et al VS Greenville County Planning Commission , defendant, et al

Case Number: 2021CP2301501

Type: Order/Other

So Ordered

s/ Honorable Perry H. Gravely, #2755