FILED IN OPEN COURT, THIS THE
11 DAY OF April, 2018
Shirl Eddard, CLERK
FAYETTE COUNTY SUPERIOR COURT
KB

IN THE SUPERIOR COURT OF FAYETTE COUNTY
STATE OF GEORGIA

TSTT INVESTMENTS, LLC,

Plaintiff,

v.

FAYETTE COUNTY, GEORGIA,

Defendant.

Civil Action No.: 2016V-0653
(CCE)

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~~PROPOSED ORDER~~ FINAL JUDGMENT

The matter as above-styled having come before this Court for bench trial March 26, 2018 through March 27, 2018; both parties having requested Findings of Fact and Conclusions of Law; and after hearing evidence and arguments by counsel, it is hereby FOUND, ORDERED and ADJUDGED as follows:

I. FINDINGS OF FACTS

1. The property at issue in this challenge to a zoning denial is roughly 212 acres located north of Ebenezer Church Road and south of Davis Road in Fayette County, Georgia (the "Subject Property"). The Subject Property is located in the middle of the northern part of the County. Plaintiff owns the Subject Property, having purchased it as a foreclosed asset in 2010 for $1.2 million ($5,660/acre). Since that time, Plaintiff has expended an additional $213,331 on property taxes, bringing its total investment to $1,413,331. The County currently values the property for tax purposes at $1,183,230. The Subject Property is vacant and undeveloped and has been for as long as anyone can remember.

2. From the date that the County first adopted a zoning ordinance until now, the County has designated the Subject Property as A-R (Agricultural Residential). The A-R zoning

district allows for single-family homes on lots containing a minimum of five acres, and if developed as zoned the development would yield no more than 43 lots (and more likely 35 or 36 lots). No one has made any effort to develop the site for an A-R project. To the contrary, in 2005, 2007 and 2016 unsuccessful efforts were undertaken to rezone the tract to R-50 and then PUD-PRD (in 2016); respectively for 140 lots, 92 lots, and 91 lots. The site is served by public water, but is not on public sewer.

3. In compliance with the County's then-current Comprehensive Land use Plan and other development trends in the area, Plaintiff authorized developer Brent Holdings LLC to file an application on May 2, 2016 to rezone the Subject Property from A-R to PUD-PRD (Planned Residential Development) to allow for the development of 91 single-family detached homes. The PUD-PRD district is very flexible and intended creatively to cluster lots on large acreage to protect, among other things, natural resources. The PUD-PRD category is a good "fit" for the Subject Property, which contains a ravine, streams, wetlands and extensive open space. The PUD-PRD district allows a minimum lot size of one acre, but the range within the proposed community was 1 to 4-acre lots with most lots between 1 to 2 acres in size. The proposal incorporated elements of walkable developments as required by the Zoning Ordinance, an amenities package (swim/clubhouse), a common green space area with trails, sidewalks both on the street frontages and internal to the site, and street lighting. It also provided for a 100' buffer where the new development met the boundaries of older residential properties to create visual and spatial separation, as well as larger lots along that portion of the tract which abuts the Martha's Cove neighborhood to the east.

4. As required by law, the County's Planning Staff (Director Pete Frisina) first submitted the application for review and comment by a number of other Staff Members,

including Philip Mallon (Director of Public Works) and Vanessa Birrell (Director of Environmental Management). The purpose of such a review is to identify potential development issues and other aspects of the Site Plan and to communicate them to the rezoning applicant. In this instance, the Staff made a few requests of Plaintiff in terms of its design, but otherwise recommended that the application proceed.

5. By law, the Planning Staff is the professional body in the County charged with the responsibility of drafting, reviewing and interpreting both the Zoning Code and the Comprehensive Plan. It also is charged with the responsibility of reviewing, analyzing, and making a recommendation on all rezoning requests in light of four criteria expressly adopted by the County in its Zoning Ordinance. The criteria are:

(1) Whether the zoning proposal is in conformity with the land use plan and policies contained therein;

(2) Whether the zoning proposal will adversely affect the existing use or usability of adjacent or nearby property;

(3) Whether the zoning proposal will result in a use which will or could cause an excessive or burdensome use of existing or planned streets, utilities, or schools;

(4) Whether there are other existing or changing conditions affecting the use and development of the property which give supporting grounds for either approval or disapproval of the zoning proposal.

6. Armed with input from other County departments, the Planning Staff analyzed Plaintiff's rezoning request in light of these factors and issued a written report, concluding that all standards had been satisfied. As a result, the Planning Staff recommended approval of the rezoning to the PUD-PRD district, finding among other things that:

1. The subject property lies within an area designated for Rural Residential (1 Unit/2 to 3 Acres) and Conservation Areas. This request conforms to the Fayette County Comprehensive Plan.

2. The proposed rezoning will not adversely affect the existing use or usability of adjacent or nearby property.

3. The proposed rezoning will not result in a burdensome use of utilities or schools. However, the proposed rezoning has the potential to adversely affect Davis Road based on the County Engineer's estimate for trips on Davis Road (see Public Works/Engineering comments above). The County Engineer recommends a connection to Davis Road to promote interconnectivity within the County's road network. This is a stated goal in the 2010 Comprehensive Transportation Plan and is important for public safety. In addition, this option more quickly distributes the impact of traffic on the existing, surrounding roads. The County Engineer also states that the road department will be able to accommodate the added maintenance of Davis Road and that Davis Road be included as a long-term paving project.

4. Existing conditions and the area's continuing development as a single-family residential district support this petition.

7. The PUD-PRD process requires that the Planning Commission also review the proposed development in an informal review. That first meeting occurred in April of 2016. There was a substantial amount of discussion about the application. And there were changes the Planning Commission requested of the Plaintiff, including making the lots larger, adding a hundred foot buffer around a portion of it, and placing larger lots along the boundary shared with an existing neighborhood to the east. The Planning Commission also requested a traffic study, notwithstanding the acknowledgment by the Public Works Director that the size of the project did not warrant one. Nonetheless, the Plaintiff did everything asked of it.

8. The application returned two more times to the Planning Commission. Ultimately, the Planning Commission did not approve the PUD-PRD request. However, in recognition of the inappropriateness of the A-R classification, it did recommend rezoning to R-80. R-80 would allow the development of no more than 60 lots.

9. The Plaintiff's rezoning request appeared before the County Commission on July 28, 2016. A number of neighbors attended and spoke in opposition. The concerns

expressed by them were that this is a "high density subdivision" which is inconsistent with the "tone and texture of the County"; that development of this property would exacerbate an existing drainage problem; that the development would cause an unacceptable increase in traffic; that Davis Road is unsafe and unable to handle traffic; and that schools would deteriorate from adding children who will live in the new development.

However, the primary concern, and the one used by the County at trial to justify its decision, was that the proposed subdivision was "perceived" to detract from the "rural character" of the County. In response, the County Commission voted to deny the matter. One Commissioner expressly stated that "over 200 petitioners did not ask the Board to do anything other than to deny this request". He also stated that "the Board was elected to represent the citizens and the citizens have spoken." The County Commission thus ignored the recommendations of both its Planning Staff and its Planning Commission, as well as the established policies and intent of its Comprehensive Plan. Instead, it simply acceded to the speculative, unsubstantiated complaints from opponents to the project without any regard to the specious nature of their objections. In denying Plaintiff's rezoning request, the County limited development of the Plaintiff's property to 43 lots.

10. Plaintiff presented credible, clear and convincing evidence that the A-R district's restrictions, as well as the R-80 compromise suggested by the Planning Commission, render the Subject Property worthless from an economic standpoint. Plaintiff's expert--a development consultant with years of experience in the greater Atlanta area as well as internationally--explained how the Subject Property simply cannot be developed under A-R or R-80 for any economically viable use. In fact, Plaintiff's expert testified that even if Plaintiff gave the Subject Property to a developer, specific engineering challenges and the overly restrictive limits of the

A-R and RS-80 districts make it impossible to develop the Property for any allowed use without losing money. The resulting development costs would require excessive pricing of the finished lots. That lot cost, in turn, would require final home price points significantly higher than comparable homes in the area and would not be marketable.

11. Plaintiff also proved by clear and convincing evidence that any public benefit generated by the A-R zoning is minimal, and certainly does not counterbalance the substantial detriment caused to Plaintiff. Plaintiff proved that the A-R zoning district is an overly restrictive classification for the Subject Property, and there was no evidence of any relation between the zoning restrictions on the Property and the public health, safety, morality, and welfare. Defendant's own professional staff confirmed these facts. The County's reliance upon the need to protect the rural character of the County was weak at best, given the absence of any definition of rural character, much less where it is located. Additionally, this purported goal is contradicted by the multitude of earlier one-acre lot subdivisions approved immediately around and even well to the south of Plaintiff's land. This tract also is very close to the City of Fayetteville's considerably more intense development patterns. Finally, the County's Comprehensive Plan, which is a policy adopted to control growth, expressly allowed a development of one house for every 2 to 3 acres of land, or 60 to 91 homes. Although subsequently the Future Land Use Map was amended to A-R-3, even today the property may be developed for at least 60 homes. This area of the County simply is not "rural" and preserving its "rural character" at this location is not warranted.

II. CONCLUSIONS OF LAW

1. The parties agreed on the rules of law to be applied to these facts. They each note that the power to zone and rezone property is legislative. RCG Properties, LLC v. City of Atlanta

Bd. of Zoning Adjustment, 260 Ga. App. 355, 361 (2003). As a legislative act, decisions of the authority to zone, or refuse to rezone property are "presumptively valid."[1] RCG Properties, 260 Ga. App. at 361. Additionally, as a legislative act, this Court reviews the evidence "de novo".

2. The parties also agree that when challenging a zoning classification as unconstitutional, the burden is initially on the property owner to present "clear and convincing" evidence to rebut the presumption that the classification is a constitutional use of the police power to further the public benefit. Henry Cty. v. Tim Jones Properties, Inc., 273 Ga. 190, 191 (2000). More specifically, the property owner must first "come forward with clear and convincing evidence that the zoning presents a significant detriment [to it] and is insubstantially related to the public health, safety, morality, and welfare." Gradous, 256 Ga. at 469. But once the property owner's burden is satisfied, the governing authority must justify the zoning by proving that it *is* substantially related to the public health, safety, morality, or general welfare. Guhl v. Par-3 Golf Club, Inc., 238 Ga. 43, 44 (1976). In this context, "substantial relation" is essentially the same standard as "reasonableness." Id. at 45.

3. Recognizing the burdens of proof for the property owner in light of the authority set out above requires answering the question of what type of evidence amounts to "clear and convincing" evidence sufficient to show a significant detriment to the owner, as well as an insubstantial relation to the public health, safety, morality, and welfare (collectively the "public benefit"). Similarly, assuming that the property owner can satisfy his burden, what type of

[1] In describing the deference afforded to zoning as a legislative act, the courts have on occasion said that, if the validity of the zoning classification be "fairly debatable," it will be upheld against a challenge. See e.g., Gradous v. Board of Com'rs of Richmond Cty., 256 Ga. 469, 469-470 (1986). The "fairly debatable" language originated from the 1926 U.S. Supreme Court case of Euclid v. Amber Realty Co.: "[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." 272 U.S. 365, 388 (1926). However, the phrase "fairly debatable" is not itself a distinct standard or test to be applied; rather, it is simply an articulation of the presumption of validity that zoning actions enjoy.

evidence must be put forth by the County to prove that the zoning *is* in fact substantially related to the public benefit? Georgia courts have made clear that there is no "bright line" test; while the focus is almost always on the dollar amount of the reduction in property value caused by the existing zoning, there is no "magic number" establishing the dividing line between constitutional and unconstitutional zoning restrictions. Instead, the court must weigh the evidence and balance the purported detriment to the property owner against the purported benefit to the public. The result is that zoning lawsuits are fact-specific disputes that must be decided on a case-by-case basis. Mayor & Aldermen of the City of Savannah v. Rauers, 253 Ga. 675, 675 (1985). If after balancing the evidence a court determines that the zoning provides "relatively little gain or benefit to the public while inflicting serious injury or loss on the owner," the zoning is unconstitutional and void. Barrett v. Hamby, 235 Ga. 262, 266 (1975).

4. In this case the zoning restrictions go far beyond a mere "interference" with Plaintiffs' property interest in their "investment-backed expectations," which have been destroyed by the A-R zoning classification. Plaintiff's property is incapable, as a direct result of its zoning, to be developed for *any* commercially practical use; in other words, its value essentially is $0. See Mann, 278 Ga. at 443 ("[A] regulation that 'denies all economically beneficial or productive use of land' will require compensation." (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001)). Accordingly, this case falls into the most extreme category of regulatory takings, "total takings," as pronounced in the momentous U.S. Supreme Court case Lucas v. South Carolina Coastal Council: "when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." 505 U.S. 1003, 1019 (1992). Based upon

the evidence presented at trial, the Property at issue here is just that, economically idle, and thus the law dictates a finding that the existing zoning classification is unconstitutional as a taking.

5. The area in which Subject Property is located will not support a new home sale price above the $400,000 to $450,000 range. To develop the Subject Property under the AR zoning district and just break even, however, a developer would have to sell each AR lot for $144,160, and each RS-80 lot for $129,726. That lot price translates to a home sale price of $746,400 if an AR lot, and $645,000 if on an RS-60 lot, a figure that is 50% to 66% higher than the market will bear. The only way to develop the Subject Property and keep the home prices within the market range is under the PUD-PRD, 91 lot scenario proposed by the Applicant. The per lot cost to develop in that scenario is $104,000 to $114,000. That lot cost translates into a new home sale price of $419,000 to $456,000 which is what the surrounding market supports. Legacy Investment Group v. Kim, 279 Ga. 778 821 S.E.2d 453 (2005), supports the contention that this scenario presents a clear case of significant economic detriment. Defendant simply did not credibly rebut this testimony.

6. The mere existence of neighborhood opposition is not a legally sufficient reason to uphold a rezoning denial. AT&T Wireless PCS v. City of Chamblee, 10 F.Supp.2d 1326 (N.D. Ga 1997); Crymes v. DeKalb County, 258 Ga. 30 31 (1988); also see Rea v. Cordele, 255 Ga. 390 (1986). Nor is a mere increase in traffic a legitimate basis to sustain such a denial. Victoria v. Atlanta Commercial Mart and City of Atlanta, 101 Ga. App. 163 (1960); Brand v. Wilson, 252 Ga. 416 (1984).[2] Nor are other unsubstantiated generalized fears a lawful basis upon which to uphold a denial. Bartenfeld v. Fulton County, 257 Ga. 766 (1988). Storm water problems apparently already exist in this area, meaning this future development obviously has

[2] Regardless, Plaintiff's Traffic Engineer was unrebutted in his testimony that no negative impact would be caused by the traffic generated by all lots.

not contributed to them. The County has strict codes in place to prevent additional flooding. At the proverbial "bottom line", Plaintiff's application was consistent with the County's Comprehensive Plan which Defendant was forced to concede. Moreover, both the County (and Fayetteville, for that matter) already has/have approved redevelopment considerably more consistent with Plaintiff's application than a development of 5-acre lots here. The impact of this inconsistent precedent also cannot be denied. DeKalb County v. Albritton, 256 Ga. 103 (1986).

7. Even if the County is able to produce evidence that the A-R classification has some arguable benefit insubstantially related to the County as a whole, this factor weighs heavily in favor of Plaintiff. As previously discussed, the detriment caused by the current zoning is absolute; even assuming Plaintiff did not make a profit from the sale, it still cannot be developed for any economically viable use unless one-acre lot sizes are allowed. This is the ultimate detriment in terms of land use regulation. So even if the County had proven that the A-R classification has some relationship to a tangible public benefit, the Court would still conclude that Plaintiff's detriment outweighs such benefits. See e.g., City of Roswell v. Heavy Machines Co. Inc., 256 Ga. 472, 473 (1986) (holding that even in light of expert testimony that existing roads "could not handle" increased traffic generated by proposed commercial rezoning, factors still weighed in favor of the property owner). But because there is no evidence of such benefits in this case, there is nothing to weigh.

III. CONCLUSION

In sum, this was a fact-intensive case. It was also a case in which the County presented no evidence to support the economic value of the property if zoned A-R, or RS-80 as well as a weak rebuttal regarding the public purpose justification for the denial. The Court has balanced the evidence each party presented at trial and concludes that Plaintiff clearly and convincingly

presented credible evidence to establish the economic detriment it has suffered and will continue to suffer as the owner of the Subject Property, as well as the absence of any reasonable benefit to the public from retaining it. Regulatory restrictions like the A-R or RS-80 classifications, as applied to the Property, effectively prohibit it from realizing any economically viable use. Plaintiff also clearly and convincingly presented evidence that there is no countervailing public welfare benefit to offset this loss. Anything other than zoning the property to a district which allows an economically viable use is hereby declared unconstitutional by this Court, and specifically the A-R and RS-80 categories as applied to the Subject Property are unconstitutional.

Accordingly, IT IS HEREBY ORDERED THAT:

The Plaintiff's rezoning application (or another configuration thereof which yields economically viable lots) is hereby remanded to the County's Board of Commissioners for rehearing, as soon as Defendant is able to advertise and sign post the property in compliance with the Zoning Procedures Law, O.C.G.A. § 36-66-1, et seq. The County will evaluate the application under the Comprehensive Plain in effect in 2016 when the application was denied. The Court will retain jurisdiction of this matter until the Board of Commissioners has voted upon the application at that public hearing and been advised by Plaintiff that said decision is acceptable. At that point, this Order shall become Final. However, if Plaintiff remains convinced that the new decision is also unconstitutional, then it may reappear before the Court via application for contempt.

Considered pursuant to ~~Exhibit~~ Attached — cak, JS

SO ORDERED, this 11 day of April, 2018.

Christopher C. Edwards
JUDGE, Fayette County Superior Court
Griffin Judicial Circuit

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From:	Avila, Shawna E. <SAVILA@SGRLAW.COM>
Sent:	Tuesday, April 10, 2018 1:24 PM
To:	Kaye Mrozinski
Cc:	Zickert, Kathryn; Philip P. Grant
Subject:	TSTT Investments v. Fayette County 2016V-0653 -- Plaintiff's Proposed Order (executed)
Attachments:	Plaintiff_s Proposed Order (18224303_1).PDF

Kaye,

Per Judge Edwards' instructions, we have attached Plaintiff's Proposed Order regarding Civil Action No. 2016V-0653. Please confirm that we do not need to appear in front of Judge Edwards tomorrow in light of this consented Proposed Order. Thank you and I look forward to hearing back from you.

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EXHIBIT A