

1997 WL 34607823 (S.C.Com.Pl.) (Trial Order)
Court of Common Pleas of South Carolina.
Charleston County

THE I'ON COMPANY, L.L.C., Plaintiff,
v.
THE TOWN OF MOUNT PLEASANT, Defendant,
v.
James A. Renneker and Henery G. Thomas, IV, Intervenors.

No. 97-CP-10-3428.
October 30, 1997.

Order

[R. Markley Dennis, Jr.](#) Presiding Judge, 9th Judicial Circuit.

This is a declaratory judgment action which came before me for non-jury trial on September 19, 1997. The Plaintiff prays for a declaration that its property may not be rezoned by the citizens of a municipality via the initiative and referendum process set forth in Title 5. A number of arguments were presented by the Plaintiff in support of its position. It is not necessary for this court to address all of the Plaintiff's arguments¹ as I find that where a municipality's zoning ordinances were enacted in accordance with Title 6, zoning via the initiative and referendum process set forth by Title 5 is proscribed.

Footnotes

OVERVIEW AND PROCEDURAL HISTORY

The Plaintiff, The I'On Company, L.L.C. (formerly The Graham Company, hereinafter "I'On"), is constructing a traditional neighborhood development on a tract of land in Mount Pleasant, South Carolina. To accommodate the development, the zoning on the tract of land was changed to Planned Development ("PD") by virtue of Ordinance No. 97010 which was duly enacted by the Town of Mount Pleasant on March 11, 1997. Thereafter, citizens opposed to the development circulated a petition asking Town Council to repeal Ordinance No. 97010 or to hold a referendum so the citizens could vote on whether to repeal the ordinance and thereby re-zone the tract of land to R-1. An adequate number of signatures was obtained on the petition and on August 12, 1997, Town Council voted not to adopt the initiated ordinance but to conduct a referendum pursuant to *S.C. Code Ann. § 5-17-30*. I'On filed the within action to determine whether it is entitled to continue developing the property under the PD zoning and whether the Town's citizens have a right to repeal the ordinance through the initiative and referendum process. The Town has taken a neutral position and prays for a declaration from this court regarding the validity of the initiative and referendum. Two citizens have intervened as proponents of the initiative and referendum.

FINDINGS OF FACT

1. The tract of land involved in this case is located within the Town of Mount Pleasant, South Carolina.
2. The Town has enacted Ordinances which set forth the procedures for zoning or rezoning property.
3. These Ordinances were enacted under the authority of Title 6, Chapter 7 of the South Carolina Code.
4. The following are the relevant portions of the Town Ordinances:

§ 155.30 AUTHORITY

Mount Pleasant Town Council, from time to time, may amend, supplement, or change by ordinance the boundaries of the zoning districts or regulations herein established. But before such action is taken by the Council, the following procedure must be observed.

§ 15531 PROCEDURE

Any request to amend, change or supplement the ordinance shall first be submitted to the Office of the Zoning Administrator. The Zoning Administrator shall check the application and submit it to the Board of Planning and Zoning following public hearing notice, at the first regularly scheduled meeting. An impact assessment shall be required with any application to change or amend the ordinance if it meets the conditions of large scale projects ... Upon receipt of the application, the Board shall hold a public hearing and from that date have 30 days within which to submit a report and recommendation on the matter to Town Council.

§ 155.32 BOARD REPORT

The Board shall prepare its report and recommendations on the proposed change stating its findings and its evaluation of the request. In making its report, the Board *shall* consider the following factors:

- (A) The relationship of the request to the Master Plan.
- (B) Whether the request violates or supports the Master Plan.
- (C) Whether the uses permitted by the proposed change would be appropriate in the area concerned.
- (D) Whether adequate public school facilities, roads and other public services exist or can be provided to serve the needs of the development likely to take place as a result of such change, and the consequence of such change.
- (E) Whether the proposed change is in accord with any existing or proposed plans for providing public water supply and sanitary sewers to the area.
- (F) The amount of vacant land currently classified for similar development in the vicinity and elsewhere in the town, and any special circumstances which may make a substantial part of such vacant land unavailable for development.
- (G) Whether the proposed change is consistent with Subdivision Regulations of Mount Pleasant.

§ 15535 ACTION BY COUNCIL.

Following the recommendation of the Board of Planning and Zoning, the Council shall rule on the request, and direct the Zoning Administrator and applicant accordingly. If the Town Council feels that the circumstances of the case warrant a public hearing then they may vote to hold one. If the ruling is negative, the same request may not be initiated on the same parcel or any part thereof for a period of 12 months ...

§ 155.134 PLANNED DEVELOPMENT DISTRICT (PD)

(D) Administrative procedures With Regard to PD Zoning Districts.

(1) Zoning Ordinance amendment required. Any request pertaining to the establishment of a PD Zoning District shall be considered an amendment to the Zoning Ordinance ... If approved by the Town Council, all information pertaining to the proposal shall be adopted. Any proposed changes in the district shall be treated as amendments to the Zoning Ordinance and must be considered accordingly.

5. The I'On Company sought to construct a traditional neighborhood development in Mount Pleasant which required PD zoning.

6. The I'On Company complied with the Town Ordinances by submitting an application and appropriate documentation to the Zoning Administrator.

7. In September of 1995, after public hearings, the Board of Planning and Zoning recommended the zoning change. Town Council conducted public hearings and, at a meeting held December 12, 1995, voted to maintain the R-1 zoning on the tract.

8. The I'On Company revised the project to address concerns expressed by local citizens and Town Council and submitted a revised application and documentation to the Zoning Administrator.

9. On January 22, 1997, the Board of Planning and Zoning again voted to rezone the tract. On March 11, 1997, Town Council voted to enact Ordinance No. 97010, zoning the tract PD.

10. Ordinance No. 97010 states:

WHEREAS, the Developers of an approximately 243 acre tract of land identified in a document entitled "I'On Impact Assessment" dated January 1997, prepared by The Graham Company, and a document entitled "The I'On Code" prepared by The Graham Company, and the sketch plan map entitled "I'On Technical Plan" dated January 28, 1997, said documents which are attached hereto and made a part hereof as Exhibits "A," "B," and "C," respectively, desire to create a planned development with a mixed use and traditional walking neighborhood built in a manner of older coastal towns like Beaufort, Charleston and the Old Village of Mount Pleasant; and

WHEREAS, the Mount Pleasant Board of Planning and Zoning held a public hearing on January 22, 1996, pursuant to the Mount Pleasant Code of Ordinances to consider this requested rezoning; and

WHEREAS, the Mount Pleasant Board of Planning and Zoning made the following findings of fact as a basis for recommendation for approval of this Planned Development Ordinance:

1. This plan is in harmony with the Master Plan which suggests this type of development,
2. That the overall density is less than what would be normal R1 zoning, which allows for more open space,
3. that the traffic has been shown to be within acceptable limits of reasonable traffic study the Engineers and further confirmed by Kimley-Horn, the Town's traffic advisors,
4. That the other impacts within the Impact Assessment are acceptable and,
5. Also with the knowledge that this is a Rezoning and Impact Assessment and a Sketch Plan and that further details will continue to be worked out concerning the roads as well as other technical details,
6. That the developer and his team of Engineers and Planners continue to work with the Town to solve these technical concerns;

WHEREAS, Mount Pleasant Town Council is empowered with the authority to adopt planned development ordinances and make amendments to the Official Zoning Map of the Town of Mount Pleasant, and now desires to do so with respect to the referenced property.

NOW, THEREFORE, BE IT ORDAINED by the Mayor and Town Council of the Municipality of Mount Pleasant, in Council assembled, that the property described as the Jordan Tract, comprising 243 acres of land located on Mathis Ferry Road to be known as "I'On," is hereby zoned PD, Planned Development, subject to the specific requirements of Exhibits "A," "B," and "C" hereto to the extent said requirements are not modified by the hereinbelow requirements, and the Official Zoning Map of the Town is hereby amended to reflect the same.

BE IT FURTHER ORDAINED THAT the I'On Code has further been clarified with respect to the building height requirement, pavement width of the right-of-way type classified as "Road" and the buffer along Mathis Ferry Road as expressed in letters to Joel Ford from The Graham Company, dated February 17 and 18, 1997, respectively, and more fully explained as follows:

1. The maximum building height shall be 30 feet as measured to the eaves of a structure. In no event shall a building be over 38 feet total height.
2. The pavement width requirement for the "Road" thoroughfare type listed in the I'On Code shall hereby be increased from 18 feet in width to 20 feet in width.
3. A twenty-five foot natural undisturbed buffer shall be provided along Mathis Ferry Road. At Town Council's discretion, an eight foot tall wooden fence shall be constructed behind the buffer, and/or additional plantings of eleagnus and wax myrtle installed within sparse areas of the buffer. The wood fence may be stained green to blend in with the existing vegetation.

11. Citizens opposing the development did not appeal the Town's decision to the circuit court as provided by *S.C. Code Ann.* § 6-7-750. Instead, opponents circulated a document pursuant to *S.C. Code Ann* § 5-17-10 entitled "PETITION TO INITIATE ORDINANCE"

12. The following ordinance was proposed by the Petition:

Whereas Town Council for the Town of Mount Pleasant approved on February 18, 1997, an ordinance providing for a change in zoning from R-1 to Planned Development (PD) a tract of land known as the Jordan Tract, 243 acres more or less, bordered by Hobcaw Creek and Mathis Ferry Road.

NOW, THEREFORE, be it ordained that the approval of Town Council for the zoning change be repealed by ordinance and the Jordan Tract revert to R-1 zoning.

13. The Petition was circulated from March 11, 1997 until June 10, 1997.

14. On July 7, 1997, the Voter Registration Office reported that the Petition contained the required number of signatures.

15. On August 12, 1997, Town Council voted against a Motion to Repeal Ordinance No. 97010 and voted to place a revised version of the proposed ordinance on the ballot.

16. The I'On Company filed the within action on July 8, 1997. The Town filed an Answer to the Complaint on August 7, 1997 denying the allegations of the complaint, but joining in the Plaintiff's request for declaratory relief. Two individuals were permitted to intervene as proponents of the initiated ordinance.

CONCLUSIONS OF LAW

1. All necessary parties are before the court.

2. The I'On Company asks this court to conduct a pre-election review of an initiated ordinance. The Town has also asked the court to declare the law with respect to the initiated ordinance so that it may comply with this court's directive. Pre-election review by the judiciary is appropriate to "determine the validity of an initiated ordinance in advance of the ballot, before the Town expends public money on what could be a useless act" and before voters are allowed "to give their time, thought, and deliberation to the question of the desirability of the legislation as to which they are to cast their ballots." *Hilton Head Island v. Expressway Opponents*, 307 S.C. 447, 415 S.E.2d 801 (1992).

3. Under state law, a county or municipality is free to zone the land within its boundaries. Title 6, Chapter 7 of the South

Carolina Code contains suggestions for local planning and envisions zoning in accordance with a comprehensive development plan. The Code provides that “any county or municipality may, but shall not be required to, exercise any of the powers granted by this chapter.” *S.C. Code Ann. § 6-7-10*. Once a municipality elects to take advantage of Title 6, Chapter 7, it must zone the property within its boundaries in the manner mandated by that Chapter. *S.C. Code Ann. § 6-7-10*. Zoning procedures mandated by the Chapter are very specific.

4. The Town of Mount Pleasant has elected to exercise the powers granted by Title 6, Chapter 7. Pursuant to the statute, the Town has enacted a Zoning Code which sets forth specific procedures which must be followed before a change in a zoning classification may be effected.

5. The citizens’ right to initiate ordinances is not guaranteed by the South Carolina Constitution, and exists only by virtue of legislative enactment. Title 5, Chapter 17 of the South Carolina Code sets forth a general statutory procedure by which citizens of a municipality may initiate ordinances.

6. Neither the zoning provisions of Title 6, Chapter 7, nor the Town’s Zoning Code, enacted pursuant to that Chapter, provide for zoning via initiated ordinance. In fact, allowing the citizens of the Town of Mount Pleasant to zone the Plaintiff’s property by holding a referendum directly violates the Town’s Zoning Code which specifically and comprehensively sets forth procedures which must be followed prior to zoning or re-zoning property. Furthermore, zoning via citizen referendum is not conducive to orderly Town Planning and may result in arbitrary and chaotic land use decisions which would directly contravene the intent of Title 6, Chapter 7. See 1989 S.C. Op. Atty. Gen. 385 (“zoning may not be an appropriate subject for the initiative and referendum process.”).

7. Since the Town of Mount Pleasant elected to enact zoning legislation pursuant to Title 6, Chapter 7 of the South Carolina code, I find that zoning pursuant to the initiative and referendum process set forth by Title 5 must be proscribed.

CONCLUSION

On the basis of the foregoing, it is hereby

ORDERED, ADJUDGED AND DECREED that the Town of Mount Pleasant is prohibited by statute and by Town Code from placing the initiated zoning ordinance on the ballot for consideration by the electorate.

October 30, 1997

<<signature>>

Charleston, South Carolina

R. Markley Dennis, Jr.

Presiding Judge, 9th Judicial Circuit

1 Of course, if this Order is appealed, Plaintiff will be able to argue its other positions as additional sustaining grounds.