SUPREME COURT OF GEORGIA

Case No. S09D0419 Atlanta, December 29, 2008

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

CITY OF ROSWELL v. ALFREDO ORTIZ et al.

From the Superior Court of Fulton County.

Upon consideration of the Application for Discretionary Appeal, it is ordered that it be hereby denied.

07CV132226

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

SUPREME COURT OF THE STATE OF GEORGIA 1845

Jeanette Eidson Deputy Clerk.

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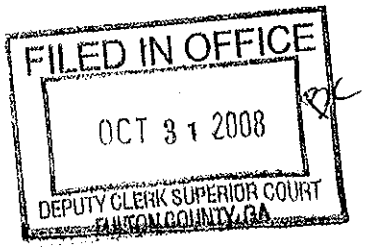
IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA



ALFREDO ORTIZ, DIANA ORTIZ, WILLIAM OLIVER, and BETTY ANN NATION,	)	
Plaintiffs,	)	CIVIL ACTION
v.	)	
CITY OF ROSWELL, GEORGIA,	)	FILE NO. 2007CV132226
Defendant.	)	

FINAL ORDER AND JUDGMENT

WHEREAS, this case having been heard at a bench trial on October 7, 2008, and the parties having been heard, and witnesses and evidence presented, this Court enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

Plaintiff Alfredo Ortiz is the property owner of 1266 Minhinette Drive in Roswell and has an option to purchase 1253 Minhinette Drive, an adjoining property.[1] Plaintiff petitioned the City of Roswell to rezone the two lots, together comprising 1.017 acres, from their existing R-2 (single-family medium density residential) classification to the R-3a (multi-family medium density residential) classification, which allows attached and detached homes. Plaintiff sought to erect two single-family homes and three townhomes on the subject property. The two lots currently contain two homes, built in the 1950s, that are approximately 1200 square feet, and are intermittently rented at a below market rent.

[1] Other Plaintiffs include Diana Ortiz, also an owner of 1266 Minhinette Drive; Betty Ann Nation, owner of 1253 Minhinette Drive; and William Oliver, a co-applicant for rezoning.

Plaintiffs Ortiz and Oliver filed a rezoning petition in December of 2006, which was denied in March of 2007. Within 100 feet of the northern border of the subject property is another parcel of 1.6 acres, located at 1273 Minhinette Drive, which was recently rezoned from R-2 to R-3a to allow eight townhomes to be built where only one single-family home stood previously. Plaintiffs filed suit to appeal the denial of their rezoning request. Plaintiffs seek a declaratory judgment that the current zoning of the subject property is unconstitutional, asserting that it violates the due process and takings provisions of the Constitution of the State of Georgia. Plaintiffs further allege that they were denied their rights of equal protection under the Georgia and Federal Constitutions since the similarly-situated property just up the street (i.e., 1273 Minhinette Drive) was rezoned from R-2 to R-3a. Plaintiffs assert that the denial of their nearly identical property, only six months later, was arbitrary and capricious and violated equal protection.

The Plaintiffs' property is surrounded by property zoned R-3c (multi-family residential district with conditions) to the north, south and east. To the west of the subject property, across Minhinette Drive, are parcels zoned R-3c and R-2. According to the staff report prepared by the Community Development Department, and entered into evidence, the property adjacent to the north is developed at 6.65 units per acre; the property to the south is developed at 6.5 units per acre; the property to the east is developed at 6.65 units per acre; and the property to the west is developed partially at 7.5 units per acre and partially at 2.6 units per acre. The proposed density for the subject property was 4.92 units per acre, which is consistent with the surrounding property.

The R-2 zoning classification limits the subject property to certain uses enumerated in the zoning ordinance. Use of the subject property in a manner not enumerated within the R-2 category, such as the townhomes desired by Plaintiffs, requires that the subject property be rezoned. The staff report opined that the proposed multi-family zoning would not adversely affect the usability of adjacent and nearby properties, that the proposed multi-family zoning may not cause an excessive or burdensome use of existing streets, transportation facilities or utilities, that the proposed multi-family zoning may be suitable for the subject site considering the existing surrounding development along Minhinette Drive, and that the proposed multi-family zoning is consistent with the overall zoning scheme for the area and does fulfill the purpose of the zoning regulations as the zoning scheme provides for similar uses. The staff report further recognized that most of the property on Minhinette Drive is zoned R-3.

The Plaintiff Alfred Ortiz testified that the subject property could not be profitably developed. He testified that the fixed development costs associated with grading, stormwater, engineering and drawing of plans, general contractor fees and other fixed fees were high enough, when combined with the cost of construction and the cost of the property, to make the property unprofitable to develop at a density of three or four homes per acre. Under R-2 zoning, as currently assigned to the property, the property could only hold a maximum of three homes. The evidence showed that since the property could not be profitably redeveloped, it would be condemned to its current state, containing two substandard, old, small homes that would continue to deteriorate in value compared to similar surrounding property.

The evidence showed that the R-2 zoning was essentially an island surrounded by R-3 and R-3a zoning and townhomes, and that all the surrounding property had been redeveloped in the recent past. Most particularly, the almost identical 1.6-acre tract just 100 feet to the north had been rezoned from R-2 to R-3a just six months before this rezoning application was filed in order to allow one old single-family home to be replaced with eight townhomes.

The City's Director of Planning Bradford Townsend testified that the sole reason that the staff recommended denial of the rezoning was that the proposed density of nearly five units per acre was not consistent with the Future Land Use Map of the City, which called for the property to remain at 2 to 2.5 units per acre. However, under cross examination, Mr. Townsend admitted that all the surrounding property was zoned inconsistent with the Future Land Use Map, and he admitted that it would be consistent with sound planning principles to rezone the subject property to R-3a. The evidence showed that the City of Roswell had not followed its comprehensive plan on any of the surrounding property to the north, east or south, and had only partially followed it to the west. Further, the Comprehensive Plan contains polices supporting infill redevelopment of older, smaller homes to townhomes, and the proposed rezoning and associated project was consistent with these policies.

The evidence also showed that no neighbor objected to the proposed rezoning, and that the City's staff found that the proposed rezoning would be consistent with the pattern of development and zoning of the surrounding property, which was mainly R-3 and R-3a, and mainly developed with townhomes.

CONCLUSIONS OF LAW

This case presents two legal challenges: that the rezoning constitutes a violation of Plaintiffs' rights to equal protection under the Georgia and Federal Constitutions, and that the rezoning constitutes a taking without due process under Georgia law. Two different standards apply.

I. Equal Protection Analysis

For an equal protection violation, the Court must find that the zoning is arbitrary. A classification in a zoning ordinance is arbitrary and offends the equal protection clauses of the State and Federal Constitutions unless it has some fair and substantial relation to the object of the legislation and furnishes a legitimate ground of differentiation. Bailey Inv. Co. v. Augusta-Richmond County Bd. of Zoning Appeals, 256 Ga. 186, 187, 345 S.E.2d 596 (1986). Further, the constitutional guaranty of equal protection requires that all persons shall be treated alike under like circumstances and conditions. Rockdale County v. Burdette, 278 Ga. 755, 756, 604 S.E.2d 820 (2004); see also Cherokee County v. Greater Atlanta, Homebuilder Assn., 255 Ga.App. 764(1), 566 S.E.2d 470 (2002).

The Court finds that the property at 1273 Minhinette Drive is essentially identical to the subject property. The acreage was 1.6 versus slightly over 1 acre, a meaningless difference of less than ½ acre. Both properties were zoned R-2 and requested rezoning to R-3a. Both properties contained older single-family residences. Both properties were surrounded by townhome development at R-3 and R-3a densities. The two properties are nearly touching, and were requested for rezoning within six months of one another.

The City advanced no argument to differentiate the two properties other than the two projects were slightly different, in that one contained all townhomes (eight

townhomes on the 1.6-acre property at 1273 Minhinette Drive) and the other contained only five residences, three townhomes and two single-family homes. However, the nature of the development is not the issue in an equal protection zoning challenge; that distinction is constitutionally meaningless. The issue is the underlying zoning applied to the two properties, not the subsequent development. The proposed development, like the development at 1273 Minhinette, was lawful under the R-3a zoning classification, and thus the two properties are similarly situated for constitutional analysis. The denial of R-3a zoning to the Plaintiffs' property was arbitrary and capricious. The Plaintiffs' rights to equal protection were denied by the denial of the R-3a rezoning request. The Court finds that the refusal to rezone the property to R-3a constitutes an abridgement of the Plaintiffs' rights to equal protection under the state and federal constitutions.

II. Taking Analysis

The Court, in the interests of completeness, also analyzes the takings challenge. When a property owner contends that a zoning classification is unconstitutional, the burden is on the property owner to present clear and convincing evidence to rebut the presumption that the zoning classification is constitutional. The property owner must establish by means of clear and convincing evidence that the owner will suffer a significant detriment under the existing zoning, and that the existing zoning bears an insubstantial relationship to the public interest. Henry County v. Tim Jones Properties, 273 Ga. 190, 191, 539 S.E.2d 167 (2000).

As the individual's right to the unfettered use of his property confronts the police power under which zoning is done, the balance the law strikes is that a zoning classification may only be justified if it bears a substantial relation to the public health,

safety, morality or general welfare. Lacking such justification, the zoning may be set aside as arbitrary or unreasonable. As these critical interests are balanced, if the zoning regulation results in relatively little gain or benefit to the public while inflicting serious injury or loss on the owner, such regulation is confiscatory and void. Moreover, the Supreme Court has specifically ruled that for such unlawful confiscation to occur, requiring that the zoning be voided, it is not necessary that the property be totally useless for the purposes classified. It suffices to void it that the damage to the owner is significant and is not justified by the benefit to the public. A.C. Guhl v. Holcomb Bridge Road Corp. 238 Ga. 322, 323, 232 S.E.2d 830 (1977); see also, Barrett v. Hamby, 235 Ga. 262, 219 S.E.2d 399 (1975).

In this case, the Plaintiffs demonstrated a significant detriment. As in Tim Jones, supra, the development of the property under the existing zoning was infeasible. The fixed costs are too great to provide any profit unless more than the three homes currently allowed are permitted. The Plaintiff demonstrated that the property as currently zoned was likely to diminish in value compared to surrounding properties, and that the homes on the subject property were not economically feasible. The two homes are older, smaller homes, and not suitable to the current market. The City's comprehensive plan recognized that such uses were not feasible and contemplated that they would be redeveloped with infill redevelopments. The Plaintiff Ortiz testified that the existing homes are rented sometimes at a rate that cannot even support the costs of the property. Thus, the property is expected to continue to decline, since profitable redevelopment is not possible under the current zoning. The difficulty in developing the property feasibly, the lack of a market for the property as zoned, and the general detriment imposed on the

property compared to surrounding property, all demonstrate a significant detriment. See, Tim Jones; see also, Candler & Assoc., Inc. v. City of Roswell, 258 Ga. 621, 622, 373 S.E.2d 19 (1988) (evidence that "the property, as zoned, is worth less than" similarly zoned property "because it is completely unfeasible to develop it" under that classification); City of Atlanta v. Standish, 256 Ga. 836, 837, 353 S.E.2d 489 (1987) (evidence of persistent vacancies and "frequent lapses in occupancy" of rental property); City of Roswell v. Heavy Machines Co., Inc., 256 Ga. 472, 473, 349 S.E.2d 743 (1986) (evidence that "current zoning was not reasonable or appropriate"); DeKalb County v. Albritton Properties, 256 Ga. 103, 108(1)(a), 344 S.E.2d 653 (1986)(evidence of "a downturn in viability of the neighborhood as a residential area, and ... a sharper downturn of land value if the land remained under a residential classification"); Rea v. City of Cordele, 255 Ga. 392, 394, 339 S.E.2d 223 (1986) (evidence "that it is not economically feasible to develop the property under its current classification").

Against that detriment, the City could demonstrate no relationship to the public health, safety and welfare that justified the current R-2 zoning. The property is entirely surrounded by R-3 and R-3a townhome development but for a small single-family development to the west. The City's own staff analysis concluded several times that the proposed project was consistent with the surrounding zoning and surrounding uses, since it is mostly R-3 and R-3a and mostly over 6 units per acre. Leaving the subject property R-2 was consistent only with the Future Land Use Map, a map that has not been followed by any of the surrounding property. Instead, the denial of this rezoning leaves the subject property as an island of inconsistent zoning. The City's own witness, the Director of Planning, testified that it would be sound planning to rezone the subject property, and that

the entire area was inconsistent with the existing Future Land Use Map. Thus, the balancing test under Georgia law falls heavily in favor of the property owner, and the Court finds that the existing R-2 zoning is unconstitutional.

FINAL JUDGMENT

The Court finds that the current R-2 zoning is unconstitutional. The Court also finds that the denial of rezoning to R-3a constitutes a violation of equal protection. While the Court is mindful that it lacks the power to zone, the City of Roswell is ordered to remedy the above findings and impose a zoning classification on the subject property that is not unconstitutional and that cures the equal protection violation. The Court shall retain jurisdiction to enforce its order under the guidelines of Alexander v. DeKalb Co., 264 Ga. 362, 444 S.E.2d 743 (1994).

This 30th day of October, 2008.

JUDGE THELMA WYATT CUMMINGS MOORE
SUPERIOR COURT OF FULTON COUNTY

Order submitted by:

Peter R. Olson
Georgia Bar No. 553102
Attorney for Plaintiffs
Jenkins & Olson, P.C.
15 South Public Square
Cartersville, Georgia 30120
(770) 387-1373