

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE  
April 23, 2008 Session

**DENNIS B. GANN, ET AL. v. THE CITY OF CHATTANOOGA, ET AL.**

**Appeal from the Chancery Court for Hamilton County  
No. 07-0069    Howell N. Peoples, Chancellor**

**No. E2007-01886-COA-R3-CV - FILED SEPTEMBER 30, 2008**

The plaintiffs, Chattanooga residents whose homes are adjacent to a tract of land that was rezoned to make way for the construction of a grocery store, sought a declaratory judgment that the zoning amendment was illegal. The City of Chattanooga, the Chattanooga City Council, and the developer, Wilwat Properties, Inc., were named as defendants. Plaintiffs argue that the rezoning did not comply with the Hixson-North River Land Use Plan; that the City Council's approval of the application is arbitrarily inconsistent with the council's prior denial of a similar application; and that the council impermissibly relied upon the recommendation of the Hixson North River Leadership Committee – a recommendation that was made at an informal meeting of which the plaintiffs claim to have had no notice. The trial court dismissed the case at the close of the plaintiffs' proof, finding that the plaintiffs had failed to prove that the zoning decision lacked a rational basis or was arbitrary, capricious or unconstitutional. Plaintiffs appeal. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court  
Affirmed; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

John R. Anderson, Harry R. Cash, Robert S. Grot, and Catharine H. Giannasi, Chattanooga, Tennessee, for the appellants, Dennis B. Gann, Glenda Jean Gann, Clinton S. Ingram, Jr., and Berthell Ingram.

Phillip A. Noblett and Crystal R. Freiberg, Special Counsel, Office of the City Attorney, Chattanooga, Tennessee, for the appellees, the City of Chattanooga and the Chattanooga City Council.

W. Scott Parrish and Neil A. Brunetz, Chattanooga, Tennessee for the appellee, Wilwat Properties, Inc.

**OPINION**

In September 2006, developer Wilwat Properties submitted a request to the Chattanooga-Hamilton County Regional Planning Agency, seeking to rezone 10.9 acres of property on the southwest corner of Hixson Pike and Cassandra Smith Road from R-1 (residential) and O-1 (office) to C-2 (commercial). The Regional Planning Agency staff recommended approval, with certain conditions, and forwarded its recommendation to the Planning Commission. The Planning Commission also recommended approval. The City Council then took up the case, and in November 2006, after a properly noticed public hearing at which citizens on both sides of the issue were heard, the council formally amended the Chattanooga Zoning Ordinance in accordance with Wilwat's request.

The plaintiffs filed this action for declaratory judgment in January 2007. Their complaint emphasizes that the decision to zone the area as C-2 (commercial) is a deviation from the Hixson-North River Land Use Plan (also sometimes known as the "Hixson-North River Community Plan"), which calls for "light business mix" as the "highest recommended use" for the portions of the rezoned area fronting Hixson Pike, and "medium density residential" as the "highest recommended use" for the portions fronting Cassandra Smith Road. The complaint notes that the Regional Planning Agency's recommendation conceded that "this request does not fully comply with the land use plan." The complaint argues:

By enacting an ordinance directly contrary to the comprehensive Plan it adopted, which comprehensive Plan is currently in force, Chattanooga opened the door to commercial creep down Cassandra Smith Road, in direct conflict with recommendations made by the Plan that Chattanooga has adopted to serve as a blueprint for future development in the area in question, and also failed to address infrastructure impacts of the proposed development.

A bench trial occurred in June 2007. At the conclusion of the plaintiffs' proof, the defendants made a Tenn R. Civ. P. 41.02(2) motion to dismiss. The motion was granted.

"[I]n [a] non-jury case, when a motion to dismiss is made at the close of plaintiff's case under Rule 41.02(2), the trial judge must impartially weigh and evaluate the evidence . . . , determine the facts of the case, apply the law to those facts, and, if the plaintiff's case has not been made out by a preponderance of the evidence, a judgment may be rendered against the plaintiff on the merits[.]" *City of Columbia v. C.F.W. Const. Co.*, 557 S.W.2d 734, 740 (Tenn. 1977). On appeal, "review of findings of fact by the trial court . . . shall be *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d). Conclusions of law are also reviewed *de novo*, but with no presumption of correctness. *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993).

The trial court in the instant case held, in pertinent part, as follows:

After hearing the argument of counsel, and the testimony of all plaintiffs' witnesses in open court . . . the Chancellor finds that the City had presented a number of reasons why this change in zoning

was granted and that the evidence established that *this zoning decision was in fact fairly debatable* and that this decision to rezone was debated by the City Council of the City of Chattanooga; . . . [and] further finds that the evidence presented by the plaintiffs *failed to prove that there was no rational basis* for the legislative zoning decision . . . and that from the witnesses who testified on behalf of the plaintiffs, the Chancellor heard a plethora of reasons for the rezoning action by the City Council; . . . [and] further finds that there was *no arbitrary, capricious or unconstitutional action* of the City Council . . . in adopting this amendment to the zoning ordinance[.]

(Emphasis added.)

The court's allusion to certain legal principles in the course of its opinion is supported by law. "When a municipal governing body acts under its delegated police powers either to adopt or amend a zoning ordinance, it acts in a legislative capacity and the scope of judicial review of such action is quite restricted." *Fallin v. Knox County Bd. of Comm'rs*, 656 S.W.2d 338, 342 (Tenn. 1983). In fact, "[l]egislative classification in a zoning law, ordinance or resolution is valid if *any possible reason* can be conceived to justify it." *Id.* (quoting *State ex rel. SCA Chemical Waste Services, Inc. v. Konigsberg*, 636 S.W.2d 430, 437 (Tenn. 1982)) (emphasis added). Put another way,

in cases where the validity of a zoning ordinance is *fairly debatable*, the court cannot substitute its judgment for that of the legislative authority. If there is a *rational or justifiable basis* for the enactment and it does not violate any state statute or positive constitutional guaranty, the wisdom of the zoning regulation is a matter exclusively for legislative determination.

*Fallin*, 656 S.W.2d at 342-43 (quoting 82 Am.Jur.2d Zoning and Planning § 338 (1976) at 913-14) (emphasis added). "[T]he courts should not interfere with the exercise of the zoning power . . . unless the enactment . . . is shown to *be clearly arbitrary, capricious, or unreasonable*, having no substantial relation to the public health, safety, or welfare, or is plainly contrary to the zoning laws." *Id.* at 343 (quoting same) (emphasis added).

As can be seen, the plaintiffs' contention that the trial court "erred by utilizing the wrong burden of proof" lacks merit. It is true, as plaintiffs note, that the "no rational basis" standard requires a plaintiff to "prove a negative," but that is not an error; it is what the law demands in such cases. The law deliberately makes the plaintiffs' burden high, out of deference to the legislative power over zoning matters. Further, although the plaintiffs argue that an otherwise rational basis "cannot stand in light of evidence of arbitrary, capricious, unreasonable or illegal behavior," in this case the trial court specifically found that there was "no arbitrary, capricious or unconstitutional action" on the part of the City Council. Although the trial court's precise wording differs slightly from the equivalent wording in *Fallin*, it is clear to us that the court

reviewed the evidence under the correct legal standard, and concluded that the plaintiffs failed to prove any action by the City Council that would entitle them to relief under *Fallin*.

The only question for us to answer, therefore, is whether the evidence preponderates against the court's factual findings, so as to overcome the presumption of correctness. The key factual findings are: 1) "the evidence established that this zoning decision was in fact fairly debatable"; 2) "the evidence presented by the plaintiffs failed to prove that there was no rational basis for the . . . decision"; and 3) "there was no arbitrary, capricious or unconstitutional [or illegal, *etc.*] action of the City Council." The plaintiffs dispute these findings on essentially three grounds. First, they argue that "approval was premised on compliance" with the Hixson-North River Land Use Plan (hereinafter "Land Use Plan" or "Plan"), when in fact the rezoning action was a deviation from the Plan. Second, they argue that the approval of *this* rezoning request is inconsistent with a prior denial of a *similar* zoning request that was, according to the plaintiffs, denied solely because it was in violation of the very same Plan.<sup>1</sup> The plaintiffs argue that this inconsistency is so jarring as to be arbitrary and capricious. Finally, the plaintiffs argue that the City Council relied upon the prior approval of the Hixson North River Leadership Committee, an informal group of citizens that endorsed the proposal after a presentation by the developer. In its brief, Wilwat points out that it took various steps to obtain community support, including its presentation to the Leadership Committee, but that "absolutely none of these meetings were required by law." However, the plaintiffs allege that the Leadership Committee "effectively became the fact-finding arm of the City Council with regard to whether this development would be an asset to the community," and that due process requirements should therefore be applied to the Leadership Committee meeting, of which the plaintiffs claim they did not receive notice.

The plaintiffs' first contention, that the City Council's action was "premiered on [the application's] compliance" with the Land Use Plan, is simply unsupported by the evidence. The plaintiffs have not proven that the City Council erroneously believed their rezoning action was in compliance with the Land Use Plan. Moreover, the plaintiffs' extensive elucidation of the action's non-compliance is ultimately a non-sequitur, because compliance with the Land Use Plan is *not legally required*. It is a plan, not a law. The City Council is allowed to deviate from it, and did so here. As defendant Wilwat Properties argues in its brief:

Plaintiffs' argument [appears to be] that the City Council acted arbitrarily, capriciously or illegally by not relying solely on the Land Use Plan to zone property. However, the Hixson North River Land Use Plan and the Chattanooga Zoning Ordinance are separate issues. It is undisputed in the record that the Land Use Plan is not a law, ordinance or regulation and has no legal effect, while the Chattanooga Zoning Ordinance is just that, a law duly adopted and passed by the City Council. The Land Use Plan is an area-wide document identifying the goals and aspirations for growth in the community.

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<sup>1</sup> Portions of the Plan were amended in 2004, but the plaintiffs contend that these amendments had no effect on the matter at issue.

The plaintiffs have not proven that the City Council violated the zoning laws – at most, they have offered proof tending to show the council deviated from a non-binding “plan.” Needless to say, this is not enough to carry their burden.

This leads to the plaintiffs’ second argument: that the City Council’s deviation from the Land Use Plan, even if not arbitrary, capricious, or illegal on its face, *becomes* arbitrary and capricious when viewed in light of the City Council’s previous decision, in 2002, to deny a similar rezoning request. The plaintiffs claim that non-compliance with the Land Use Plan was the sole stated rationale of the earlier decision, and therefore it was arbitrary and capricious for the City Council to make the opposite decision four years later on a similar application regarding a nearly identical piece of property. The defendants respond by pointing out that there were various differences between the 2002 and 2006 applications, including: the 2002 applicant did not attend the meetings at which its application was debated; the 2002 site plan was not as detailed as the 2006 site plan; the 2002 application involved a somewhat smaller area; the 2006 applicant made various concessions in response to community and other concerns; and several others. The plaintiffs argue in their brief that these factors are irrelevant because *they were not the stated reasons* for the council’s 2002 action, at least with regard to the R-1 (residential) land fronting Cassandra Smith Road:

[T]he evidence . . . showed that, in 2002, the City Council chose to deny the rezoning of the Cassandra Smith Road tracts, not because the developer was not present, not because the site plan lacked detail, not because the proposal failed to further intrude into the residential corridor of Cassandra Smith Road, nor because the developer would not agree to concessions that would have otherwise allayed the Council’s concerns. Instead . . . the request was denied because the JDC Application was not in conformance with the Hixson North River Land Use Plan.

(Citation omitted.) We are not convinced that the plaintiffs have proven the above-stated version of events to be true, but even if they have, it would not matter. The notion that we would invalidate the City Council’s 2006 action because of a perceived inconsistency with the council’s stated rationale for an action on a similar matter, four years prior, totally misconceives our role in cases such as this. We are bound by the language of *Fallin*. If we can find any rational basis – or, stated even more broadly, “any possible reason” – to uphold the council’s decision, we must do so, absent evidence of arbitrary, capricious, or illegal action by the council. The differences between the 2002 and 2006 application certainly constitute possible, rational reasons to reach a different conclusion in 2006, regardless of how the council may have articulated its reasoning in 2002. The record simply does not demonstrate that the different results in 2002 and 2006 constitute either “discrimination” or arbitrary inconsistency. This contention is without merit.

The plaintiffs’ final argument – that the Leadership Committee acted as the City Council’s “fact-finding arm” and the Council relied exclusively on its findings – is not supported by the record. According to the testimony and other evidence elicited at trial, the council considered a variety of factors in reaching its decision, not merely the bare fact of the Leadership Committee’s approval. For example, various members of the council testified at the trial below

that they considered the results of a traffic study, input from local residents, the developer's willingness to agree to conditions and concession, and various other factors. It is not our role to re-weigh all the factors considered by the council; that would invade a legislative prerogative and would far exceed the scope of our review as defined by *Fallin*. It is sufficient for us to affirm the trial court's conclusion that "this decision to rezone was debated by the City Council," and that a rational basis existed for the council's decision. The evidence does not support the plaintiffs' allegation that the Council relied *solely* on the approval of the informal Leadership Committee.<sup>2</sup>

For all of the above-stated reasons, we conclude that the evidence does not preponderate against the trial court's factual finding that the plaintiffs failed to prove that the council's action lacked a rational basis, was not fairly debatable, or was arbitrary, capricious, unreasonable or illegal. Accordingly, the judgment of the trial court is affirmed. Costs on appeal are taxed to the appellants, Dennis B. Gann, Glenda Jean Gann, Clinton S. Ingram, Jr., and Berthell Ingram. The case is remanded to the trial court for collection of costs assessed below, pursuant to applicable law.

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CHARLES D. SUSANO, JR., JUDGE

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<sup>2</sup> We express no opinion on whether such sole reliance would, or would not, constitute a rational basis, or whether due process requirements would attach to the Leadership Committee's proceedings in such a circumstance.