

**IN THE CIRCUIT COURT OF CRAIGHEAD COUNTY, ARKANSAS
WESTERN DISTRICT
CIVIL DIVISION**

**UNICO BANK and PAT WATSON,
TRUSTEE of the CHARLES R. WATSON
FAMILY TRUST**

PLAINTIFF

Vs.

NO. 16JCV-13-350

CITY OF JONESBORO et al

DEFENDANTS

ORDER

Now on this 14th day of February, 2017, after having had a trial before the court on February 13, 2017, and the court having considered the Joint Stipulation of Facts, the Joint Exhibits, the testimony (by deposition) of various witnesses and the arguments of counsel, the court finds:

1. That this court has jurisdiction over this cause of action and the parties hereto;
2. On November 19, 2012, the Plaintiff filed an application for a Zoning Ordinance Map Amendment (the "Application") in which Plaintiff requested that approximately 48.26 acres, all located in Jonesboro, Arkansas (the "Property") be rezoned from R-1 (Single Family) to RS-7 (Single Family) and RM-8 (Multifamily).
3. The Plaintiffs, Unico Bank and the Charles R. Watson Family Trust, own 31 acres and 17.26 acres respectively, and Unico Bank acquired its interest in the 31 acres by Warranty Deed dated November 11, 2011, and the Charles R. Watson Family Trust acquired its interest in the 17.26 acres by Warranty Deed dated April 12, 2006.
4. The property to the north of the "Property" (which is directly across Ingels Road) is zoned R-1 but is used exclusively for agricultural purposes; the property to the south is zoned R-1 but is used exclusively for agricultural

purposes; the east side of the "Property" is adjacent to Higginbottom Creek, and the property to the east of the Higginbottom Creek is used exclusively for agricultural purposes and is outside the City Limits of Jonesboro, Arkansas; the property located on the west side of the northern half of the "Property" is zoned R-1 but is used exclusively for agricultural purposes; and the property on the west side of the southern half of the "Property" is zoned R-3 (LUO) High Density Multifamily which has developed as small single family residences.

5. The number of units originally proposed was 277 mixed units, consisting of 61 single family units and 216 multifamily units.
6. Under the existing R-1 zoning on the "Property", the gross density that the "Property" would accommodate is approximately 260 homes/single family lots. The proposed rezoning for the 8.81 acres to RS-7 would result in smaller lots sizes equal to 7 units per acre or 61 single family detached homes and rezoning the remaining 39.45 acres proposed to be rezoned to RM-8 would result in 315 multifamily units; however, the plaintiffs initially proposed a maximum of 216 multifamily units.
7. Under the proposed rezoning all ingress and egress to the proposed RS-7 property would be achieved via Lexee and Keely through the Caldwell Acres Subdivision while all ingress and egress to the proposed RM-8 multifamily development would be achieved via Ingels Road.
8. The Plaintiff's Application was reviewed by the City Planning Staff who found that the proposed rezoning was compatible and suitable with the Land Use Plan as to the single family but inconsistent as to the proposed multifamily.
9. The MAPC held a public hearing on the Application on December 11, 2012. Prior to the Public Hearing the Director of Planning and Zoning, Otis Spriggs, issued a report to MAPC evaluating the Application for Rezoning for its consistency with the requirements contained in Jonesboro City Ordinances for rezoning and a Zoning Code Compliance Review. No such report was done in relation to the Amended Application and no report was

issued to MAPC as to whether the Amended Application satisfied the concerns expressed in the initial report.

10. The MAPC considered the following criteria for approval of the rezoning requested in the Application as set forth in Code of Ordinances, Sec. 117-34:
 - (a) Consistency of the proposal with the Comprehensive Plan;
 - (b) Consistency of the proposal with the purpose of this ordinance;
 - (c) Compatibility of the proposal with the zoning, uses and character of the surrounding area;
 - (d) Suitability of the subject property for the uses to which it has been restricted without the proposed zoning map amendments;
 - (e) Extent to which approval of the proposed rezoning will detrimentally affect nearby property including, but not limited to, any impact on property values, traffic, drainage, sight, odor, noise, light, vibration, hours of use/operation and any restriction to the normal and customary use of the affected property;
 - (f) Length of time the subject property has remained vacant as zoned, as well as its zoning at the time of purchase by the applicant; and
 - (g) Impact of the proposed development on community facilities and services, including those related to utilities, streets, drainage, parks, open space, fire, police and emergency medical services.

11. The MAPC, after hearing the Staff recommendations for conditions to be met prior to approval of the Application and objections from concerned citizens, voted to table the application pending the completion of a floodplain study.
12. On or about March 7, 2013, Plaintiffs filed an Amended Application for a Zoning Ordinance Map Amendment in which Plaintiff requested that approximately 48.26 acres, all located in Jonesboro, Arkansas (the "Property") be rezoned from R-1 (Single Family) (the same 8.81 acres) to RS-7 (Single Family) and PD-RM (the same 39.45 acres previously requested to be RM-8).
13. The MAPC held a public hearing on the 12th day of March, 2013 on the Amended Application and again The MAPC considered the criteria for approval of the rezoning requested in the Application as set forth in Code of Ordinances, Sec. 117-34 and by a motion made and seconded found the Amended Application met the criteria for Zoning Changes and followed good land use planning with certain conditions which are enumerated in Joint Exhibit 4.
14. In the initial Application, the proposed rezoning was found by the MAPC staff to be consistent with the Land Use Plan for the area proposed to be RS-7 but inconsistent with the Land Use Plan for the area proposed to be rezoned to RM-8 (the initial requested zoning). There was an analysis done of Amendments to the Zoning Ordinance Map from June of 2009 through December of 2012. This analysis reflects that there were 61 Amendments to the Zoning Ordinance Map and of that total, only 57% were consistent with the Land Use Plan Map.
15. On or about the 18th of June 2013, on the third and final reading of the Proposed Ordinance to Rezone the "Property" the proposed Ordinance was defeated on a 4 to 8 vote.
16. At the three City Council meetings at which this proposed rezoning was in issue, members of the public raised concerns as to increased density, increased crime, future rezoning requests for the area, flooding and traffic in the area. From a reading of the minutes and reading the testimony of various members of the City Council it does not appear that the City Council or any

of its members questioned the report of MAPC and in fact the proof before the court was that very few members had even read the report of MAPC prior to voting to deny the proposed rezoning. The minutes of the three City Council Meetings where the proposed rezoning Ordinance was read reflect that there was only one (1) question asked of Otis Spriggs, the Director of Planning and Zoning for the City.

14. It is apparent to the court that as undeveloped property has been annexed to the city it automatically came into the City zoned R-1. There was no testimony to indicate this assignment of zoning was because of the nature of a particular piece of property. The "Property" was annexed to the City of Jonesboro prior to 1990 and although zoned R-1 has remained agricultural since its annexation over 25 years ago.
15. The court read testimony from various members of the City Council as to their personal motivation for voting against the rezoning as they best recalled it. Individually a city council member has no power and cannot speak for the entire council or City.
16. From the minutes of the City Council meeting and from the testimony of the individual members there is no proof before the court that the City Council ever discussed or considered "the criteria for approval of a rezoning" as required by Jonesboro City Ordinance 117-34 (e). There was one question asked of the Director of Zoning and Planning about the proposed rezoning's consistency or inconsistency with the Land Use Plan and one question related to access to the area.
17. Jonesboro City Ordinance 117-34 (e) provides:

(e) **Approval criteria.** The criteria for approval of a rezoning are set out in this subsection. Not all of the criteria must be given equal consideration by the planning commission or city council in reaching a decision. The criteria to be considered **shall include** (*emphasis added*), but not be limited to, the following:

 1. Consistency of the proposal with the comprehensive plan;
 2. Consistency of the proposal with the purpose of this chapter;

3. Compatibility of the proposal with the zoning, uses and character of the surrounding area;
 4. Suitability of the subject property for the uses to which it has been restricted without the proposed zoning map amendment;
 5. Extent to which approval of the proposed rezoning will detrimentally affect nearby property including, but not limited to, any impact on property value, traffic, drainage, visual, odor, noise, light, vibration, hours of use/operation and any restriction to the normal and customary use of the affected property;
 6. Length of time the subject property has remained vacant as zone, as well as its zoning at the time of purchase by the applicant; and
 7. Impact of the proposed development on community facilities and services, including those related to utilities, streets drainage, parks, open space, fire, police and emergency medical services.
18. It is clear from a reading of the above Ordinance that the city council must consider each of the criteria set out above but they may give some criteria more weight than others. From reading the minutes of the City Council meetings and hearing the testimony of the various councilmen it is clear that the City Council in voting to deny rezoning did not give any consideration to a number of the required criteria.
19. The Plaintiff through their argument and questioning of City Council members seem to argue that the City of Jonesboro by adopting City Ordinance 101-21 has delegated all of its authority over zoning decisions to the MAPC. Ordinance 101-21 simply delegated all "city planning commission duties and functions" to the Metropolitan Area Planning Commission. The planning commission duties of the City of Jonesboro, instead of being purely a function of the City, have been delegated to the MAPC. This does not change the ultimate responsibility for zoning and rezoning decisions which continue to lie with the Jonesboro City Council. The MAPC or any planning commission is only an advisory body when it comes to zoning and rezoning. That being said, when the planning commission thoroughly studies a proposal, considers the criteria mandated by City ordinances and makes a recommendation to the City for the rezoning of property, the City appears to act capriciously or arbitrarily if it

departs from the planning commission's recommendation without a sound basis. If the court were to find that the recommendation was meaningless and the City could ignore the recommendation, the Plaintiff would be left without a remedy to stop arbitrary and capricious action of a City.

There is an excellent discussion of the power of the courts and of city councils in zoning cases in City of Lowell v. M & N Mobile Home Park, Inc., 323 Ark. 332, 916 S.W.2d 95 (1996). In City of Lowell, the court stated:

The legislative branch has discretion to determine the interests of the public, but the judicial branch has the power to set aside legislation that is arbitrary, capricious, or unreasonable. Wenderoth v. City of Fort Smith, 251 Ark. 342, 472 S.W.2d 74 (1971). This is a limited power, and the judiciary, in acting under this limited power, cannot take away the discretion that is constitutionally vested in a city's legislative body.

323 Ark. At 337, 338. This court only has the power to interfere in the affairs of the City of Jonesboro when it acts in an arbitrary, capricious or unreasonable manner.

The bulk of the property in question that is sought to be developed is surrounded by property that is zoned R-1 but has sat undeveloped for a number of years.

In Taggart & Taggart Seed Co. V. City of Augusta, 278 Ark. 570, 573, 647 S.W.2d 458, 459 (1983) the court stated in part:

A city is required to comply with the mandatory procedural rules of its own municipal ordinances. . . . To hold otherwise would encourage the arbitrary use of power which could result in discrimination in administration.

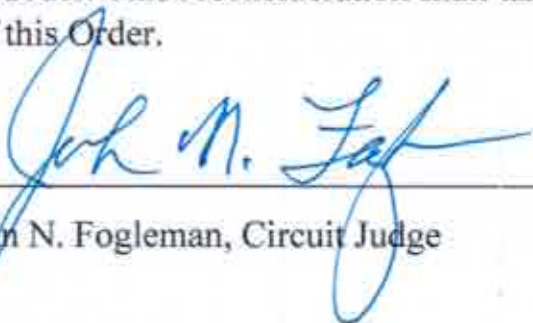
In this case City Ordinance 117-34 sets out the criteria the City is required to consider before approval of a rezoning. The City may argue that this Ordinance is directed at the planning body and not the City council. The language of the Ordinance itself addresses this argument by providing "Not all of the criteria must be given equal consideration by the planning commission or *city council* in reaching a decision." (*emphasis added*) It is clear from a simple reading of the Ordinance that it applies both to the planning body and the City Council. The City cannot argue that the Ordinance is merely directory and not mandatory. The Ordinance provides that the "criteria **shall** include." The word "shall" in legislation

is always mandatory. In this case, there is nothing to indicate that the City did what its own Ordinance required.

As a result of the City's failure to follow its own requirements contained in Ordinance 117-34 the court finds that the City has acted arbitrarily. In Taggart, the court proceeded to reverse the decision of the trial court upholding the action of the City in that case. In this case a reversal by this court of the City Council at this juncture would involve either the court substituting its judgment for that of a legislative body or in effect finding that the legislative body had forfeited its right to act on this rezoning recommendation because its initial decision was arbitrarily made. A better procedure is for this case to be reversed and remanded to the City Council to properly consider this proposal with the court maintaining jurisdiction for further action if necessary.

To be clear, zoning decisions of a municipality (including whether or not to rezone) are legislative decisions and these decisions are to be made by the governing body of the City (and not the court) unless those decisions are arbitrary, capricious or unreasonable. This court is not directing the City of Jonesboro to come to any particular conclusion but is ordering the City to follow its own ordinance and to specifically consider the approval criteria contained in Jonesboro City Ordinance 117-34.

IT IS THEREFORE ORDERED THAT THIS CASE BE REVERSED AND REMANDED to the Jonesboro City Council to reconsider the recommended rezoning consistent with the terms of this Order. This reconsideration shall take place within sixty (60) days of the date of this Order.



John N. Fogleman, Circuit Judge