**IN THE SUPERIOR COURT OF MERIWETHER COUNTY**
**STATE OF GEORGIA**

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| LUTHER H. RANDALL, III, et al.,<br>Plaintiffs<br><br>vs.<br><br>MERIWETHER COUNTY, GEORGIA, et al.,<br>Defendants | CIVIL ACTION<br><br>FILE NO. 18CV0270 |

# FINAL ORDER

The above-captioned case came before the Court on April 30, 2019, on Plaintiff's Petition for Writ of Certiorari from a zoning decision made by the Meriwether County Board of Commissioners. After considering the pleadings, briefs of the parties, argument of counsel, along with the entire record of the case, the Court enters the following order.

## PROCEDURAL HISTORY

On May 10, 2018, the Plaintiffs in this case filed a pleading titled *Verified Complaint for Review and Invalidation of Unconstitutional Zoning Ordinance and Unlawful Zoning Decision, Regulatory Taking of Property Without Just Compensation, Declaratory Judgment, Injunctive Relief, Mandamus, and other Relief*, which pleading was denominated as Meriwether County Superior Court Civil Action File No. 2018-CV-0104. In essence, the Plaintiffs want to develop a 778-acre tract of land in Meriwether County [hereafter the "Property"] for

mining and selling the granite deposits located thereon, but the Meriwether County zoning ordinance did not allow for mining activity anywhere in Meriwether County. The Defendants had unanimously voted against amending the zoning ordinance to allow for a process by which a land owner could engage in mining activity.

On June 8, 2018, the Defendants in this case answered the complaint, and on June 12, 2018, the Court conducted a hearing on Plaintiffs' complaint. On June 26, 2018, the Court entered an order of mandamus directing the Defendants to amend the Meriwether County zoning ordinance so as to allow mining activity under such objective restrictions and criteria deemed by them to be appropriate.

In accordance with the Court's order the Defendants amended the zoning ordinance on August 28, 2018, to allow for the possibility of mining operations in Meriwether County. On October 23, 2018, a hearing was held before the Meriwether County Board of Commissioners on Plaintiffs' renewed request to rezone the property and grant a special use permit. Defendants denied the request.

On November 16, 2018, Plaintiffs filed this complaint which is titled *Appeal and Verified Complaint for Invalidation of Unconstitutional Zoning and Zoning Decision, Injunctive Relief, Declaratory Judgment, Mandamus, Certiorari and Other Relief.* Plaintiffs contend that, "Defendants unreasonably,

arbitrarily, and in violation of Plaintiffs' constitutional rights, denied of (sic) Plaintiffs' request to rezone the Property from its current 'Low Density Residential' zoning classification, which prohibits any development or beneficial use of those mineral resources within that property through mining, to the 'Industrial' zoning classification with a special use approval, which would allow beneficial development of those valuable mineral resources following the required State of Georgia permitting process."

Plaintiffs seek review via certiorari of the Defendants' decision not to rezone the property in question and to deny a special use permit. The parties agree that the application for certiorari comes before this Court as an appeal "on the record" developed before the Meriwether County Board of Commissioners. Plaintiffs further seek a declaratory judgment from this Court that: (a) the Low Density Residential zoning classification is unconstitutional; (b) the decision to deny the Plaintiffs' zoning application is unconstitutional; (c) the Plaintiffs have a clear legal right to have their property rezoned as industrial property and to have their request for a special use approved and ordered by this Court via mandamus; and, (d) that they be compensated for the Defendants' taking and damaging of their property rights.

## STANDARD AND SCOPE OF REVIEW

O.C.G.A. § 5-4-12 Errors considered; scope of review; technical distinctions abolished, reads as follows:

(a) No ground of error shall be considered which is not distinctly set forth in the petition.

(b) The scope of review shall be limited to all errors of law and determination as to whether the judgment or ruling below was sustained by substantial evidence.

(c) All technical distinctions as to what questions will be considered, such as questions concerning judgments absolutely void or assignments of error drawing in question the legal constitution or jurisdiction of the tribunal below, are abolished.

"Substantial evidence" as used in the statute has consistently been interpreted by the Court of Appeals to mean "any evidence". *Macon-Bibb County Planning Commission et al. v. Epic Midstream, LLC, 2019 WL 1219362, March 15, 2019; City of LaGrange v. Georgia Public Service Commission, 296 Ga. App. 615, 675 S.E.2d 525 (2009); Norris v. Henry County, 255 Ga. App. 718, 566 S.E.2d 428 (2002); Forsyth County et al. v. Chilkders, Gober v. Childers, 240 Ga. App. 819, 525 S.E.2d 390 (1999); City of Atlanta v. Smith, 228 Ga. App. 864, 493 S.E.2d 51 (1997).*

In order to reverse the judgment of a local governing body's planning and zoning commission, the superior court must conclude that the record below lacked "any" evidence to support the commission's decision. *Macon-Bibb County Planning Commission et al. v. Epic Midstream, LLC, 2019 WL 1219362, March 15, 2019.*

When reviewing a local governing body's zoning decision, neither the superior court nor the appellate court reweighs credibility determinations of the factfinder; in other words, because the factfinder in the initial proceedings

is charged with weighing the evidence and judging the credibility of the witnesses, the superior court and the appellate court must view the evidence in the light most favorable to the factfinder's decision and must affirm the decision if there is any evidence to support it, even when the party challenging the factfinder's conclusions presented evidence during the initial proceedings that conflicted with those conclusions. *Macon-Bibb County*, ibid.

The scope of review of a writ for certiorari to the superior court is limited to all errors of law and determinations as to whether the judgment or ruling below was sustained by substantial evidence; as stated above, the substantial evidence standard is the functional equivalent of the "any evidence" standard. *Macon-Bibb County*, ibid.

At the hearing before the Board of Commissioners on October 23, 2018, certain "expert" witness reports were submitted into the record by concerned citizens opposed to the application for rezoning. It is clear to the Court that the Board of Commissioners relied upon some or all of these reports, at least in part, in considering the application.

Plaintiffs contended at the hearing before this Court on April 30, 2019, that some or all of the "expert" evidence presented to the Board of Commissioners at the hearing on their rezoning application should not have been considered because it lacked sufficient scientific reliability pursuant to *Daubert v. Merrelll Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786*

*(1993)* and its progeny. The *Daubert* rule is now codified in O.C.G.A. § 24-7-702. Plaintiffs further contended that this Court has the authority to make a legal determination from the record whether the scientific evidence should have been considered, and, if the Court determined such experts to be unreliable, to exclude their testimony from the record.

The Court can find no indication in the record that any objection was made to the admission or consideration of the "expert" reports at the time of the hearing on October 23, 2018, and no ground of error with respect to these "expert" reports was distinctly set forth in the petition as required by O.C.G.A. § 5-4-12(a). As there does not appear to be an objection to the "expert" reports at the time of the hearing, nor ground of error based thereon in the petition, this Court is without authority to consider such an objection now. Issues presented for the first time on appeal furnish nothing for an appellate court to review, for the appellate court is a court for the correction of errors of law committed by the trial court, and then only where proper exception is taken. *Angell v. Hart, 232 Ga. App. 222, 501 S.E.2d 594 (1998).*

EVIDENCE IN THE RECORD

In accordance with *Macon-Bibb County,* ibid, the Court has reviewed the record of the proceedings before the Meriwether County Board of Commissioners in the light most favorable to the Board's decision in order to determine whether there is any evidence to support the decision. In that

regard, the Court notes the following evidence in the record:

The Board of Commissioners considered the standards of the exercise of zoning power set out in the Meriwether County Zoning Ordinance, to wit:

(1) Existing land uses and zoning classifications of nearby property. Evidence was presented that there are more than 100 residences within .75 miles of the edges of the proposed quarry pits.

(2) Suitability of the subject property for the zoned purposes. Evidence was presented through expert witnesses that the subject property may not be suitable for an aggregate quarry for the following reasons: (a) the application does not adequately or reliably provide a meaningful estimate of the sales or sales taxes which may result from rezoning and permitting the property for an aggregate quarry; (b) the application does not contain sufficient information to reliably demonstrate if the proposed quarry will be operationally feasible or economically viable to produce the asserted levels, revenue streams, local jobs, or related tax revenues; (c) the $77 million valuation in the application was not sufficient proven in the application; (d) the statements in the application regarding the overall quality of the reserve body based on only four core samples are speculative; and, (e) preliminary mapping suggests the potential for pervasive schist interlayers within the granite body could make the proposed quarry operation not operationally feasible or economically viable.

(3) The extent that the property values of the subject property are diminished by the particular zoning restrictions. If the property is not suitable for the proposed granite quarry, the value of the property is not diminished by the current zoning.

(4) The extent that the destruction of property values of the subject property promotes the health, safety, morals or general welfare of the public. The current zoning of the property does not diminish the value of the property because the property in not suitable for a granite quarry. Even if further research proved that the property was suitable for the proposed granite quarry, the current zoning substantially promotes the health, safety, morals, and general welfare of the public.

(5) The relative gain to the public as compared to the hardship imposed upon the individual property owner. The current zoning imposes no hardship upon the current property owner and rezoning to allow for a granite quarry would prevent the adverse effects associated with a quarry.

(6) Whether the subject property has a reasonable economic use as currently zoned. The property has a reasonable economic use for silviculture and a telecommunications tower, and according to the applicant's appraiser is worth approximately $3,000 per acre.

(7) The length of time the subject property has been vacant as zoned considered in the context of land development in the area in the vicinity of the

property. The property has been vacant since it was initially zoned and its use growing timber is consistent with land use in the immediate vicinity of the property.

(8) Whether the proposed zoning will be a use that is suitable in view of the use and development of adjacent and nearby property. The proposed zoning for use as a granite quarry unsuitable in view of the many residences within .75 miles of the proposed quarry pits.

(9) Whether the proposed zoning will adversely affect the existing use or usability of adjacent or nearby property. The applicant failed to reliably demonstrate that the proposed zoning as a granite quarry will not adversely affect the existing use or usability of the adjacent and nearby residential property owners. Evidence from experts (real estate appraiser, geologists, noise control engineer, blasting expert) indicated that: (a) the applicants did not reliably demonstrate that the proposed quarry will not decrease the value of adjacent residential properties; (b) there is a potential for negative impacts to drinking water wells in the area of the property; (c) the application provided no details on how surface water will be reliably collected and properly concentrated to enter the quarry holes; (d) the applicant's noise study is not reliable and underestimates sound emission by more than 20 dB in several cases; (e) blasting at the quarry has a high likelihood of damaging many of the more than 100 residential structures within one to two miles of the proposed

granite pits over the life of the proposed operation and will significantly degrade the quality of life for those residents affected; and, (f) the application has no information on how the quarry operation will be reclaimed when its reserves are exhausted.

(10) Whether the zoning proposal will result in a use which will or could cause an excessive or burdensome use of existing streets, transportation facilities, utilities, or schools. The zoning proposal will cause a burdensome use of existing streets. The applicant's own traffic study indicates the quarry would cause at least a moderate increase in heavy truck traffic along Highway 362.

(11) Whether the zoning proposal is in conformity with the policies and intent of the land use plan. The proposal to rezone the property from low density residential to industrial is inconsistent with the current land use plan.

(12) 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. The existing conditions affecting the use and development of the property are the many residences in close proximity to the quarry pits along with adjacent historic communities of Alvaton and Carmel and the Carmel Historic District.

The Meriwether County Department of Community Development conducted an extensive review of the application and zoning criteria. Ultimately, the Department recommended to the Planning Commission

Members and the Board of Commissioners that the requested rezoning be denied based in part, but not limited to the following reasons:

(1) The application as submitted is not consistent with the Meriwether County Comprehensive Plan approved earlier this year.

(2) The application as submitted is not consistent with the Meriwether County Character Area Map.

(3) Review of the Standards for the Exercise of Zoning Powers does not support the requested rezoning and use at the location.

(4) The proposed rezoning and use is not consistent with other properties in the surrounding area.

(5) The subject property has a viable use based upon the current zoning and historical use of the property.

(6) The proposed use will generate additional traffic, noise, blasting, dust, and other operational processes not consistent with the surrounding properties or the Low Density Residential Zoning.

CONCLUSIONS OF LAW

There is substantial evidence in the record to support the Board of Commissioner's decision to deny the Plaintiffs' rezoning application.

ORDER

**IT IS THEREFORE ORDERD** that the decision of the Board of Commissioners should be, and hereby is, AFFIRMED.

**IT IS FURTHER ORDERED AND DECLARED BY THE COURT** that the Low Density Residential zoning classification is not unconstitutional; that the decision to deny the Plaintiffs' zoning application was not unconstitutional; that the Plaintiffs do not have a clear legal right to have their property rezoned as industrial property and to have their request for a special use approved and ordered by this Court via mandamus; and, that they are not entitled to be compensated for the Defendants' taking and damaging of their property rights.

**SO ORDERED** this 1st day of May, 2019.

Jack Kirby, Senior Judge,
Superior Court of Meriwether County

Distribution list:

Robert Norman, Esq.
bob.norman@JonesCork.com
Collier McKenzie, Esq.
collier.mckenzie@jonescork.com

Nathan Lee, Esq.
nlee@gloverdavis.com
Susan Henderson, Esq.
hendersonslaw@yahoo.com