IN THE SUPREME COURT
STATE OF GEORGIA

SHERRAN LYNN WASSERMAN,	
Appellant,	**CASE NO. S23C1029**
v.	
FRANKLIN COUNTY, GEORGIA,	**COURT OF APPEALS CASE NO. A23A0614**
Appellee.	

REPLY BRIEF OF APPELLANT

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REVIEW OF THE FACTS

Appellee in the initial "Introduction and Procedural History" portion of its Brief purports to object to Appellant's Statement of Facts on the basis that "it includes information not properly in the record, argumentative statements of belief which do not constitute facts, and alleged facts superfluous to this Court's review of the appellate court's opinion . . . consistently rel[ying] . . . on hearsay evidence, speculation and unsupported conclusions/musings from individuals outside of and not in the presence of the Board of Commissioners ('BOC')." Brief of Appellee, p. 5. But when we get to its own "Statement of Material Facts," id. at pp. 8-13, Appellee makes no effort to substantiate those allegations.

On the contrary, in its own effort to rehabilitate the disputed zoning action by the Franklin County BOC in voting to "adopt the recommendation of the PC," referring to the Planning Commission, despite the fact that the professional Planning Commission staff had recommended approval of the Pham/Wasserman CUP Application, Appellee inaccurately cited the deposition of former Franklin County Planning Director John Phillip for the following proposition:

> It is not uncommon for the PC to vote contrary to the PC staff recommendation and Mr. Pham's proposal was certainly not a "typical" poultry house operation in terms of size and location. Id. [referring to V2:742].

Brief of Appellee, p. 8.

Appellee's reference is to the four pages of Mr. Phillips' condensed deposition at V2:742, but with no specific page or line references. Nonetheless, a careful examination of those four pages, in which undersigned counsel for Appellant was examining Mr. Phillips, reveals that—contrary to the assertion by Appellee—Mr. Phillips could not recall any other example over the previous ten years that he had been Planning Director leading up to the BOC's decision in this case where "any other property that the planning staff deemed appropriate for a poultry house [based on the objective standards for poultry houses in Sections 503(7) and 1607 of the Zoning Ordinance] . . . was denied a CUP application besides this [one]." (V2:742 [Deposition, p. 27, ll. 8-12].)

Indeed, as previously argued, given the importance of the poultry industry in Franklin County and the ubiquity of odor generated by poultry houses, the universal understanding and practice was that so long as a poultry house met the uniform County setback requirements for such houses designed to control such odor, as set out in Section 503(7) of the Zoning Ordinance, odor alone could not and would not be used to deny a poultry house application. Accordingly, when asked under oath whether in his experience a proposed poultry house that has been found by the professional staff to satisfy all the objective Sections 503(7) and 1607 CUP criteria had ever been denied its CUP, Mr. Phillips admitted that—while other types of CUP's that had been recommended for approval had been denied—that was not the

case for poultry houses, which constituted a special category in the County that called for uniform treatment:

> A. I can't guarantee there's a poultry application [that was denied a CUP despite a staff recommendation of approval], no, [not] under oath.

(V2:742 [Deposition, p. 28, ll. 11-12].) Again, the point was, he could not recall a single one!

In short, given the previous invariable practice by the PC and BOC in voting on poultry house CUP applications of deferring to the evaluation of the so-called §§ 503(7) and 1607 factors by Planning Director John Phillips and because Mr. Phillips had recommended approval of the Pham/Wasserman CUP Application based on its consistency with all of those factors, PC Chairman Daphne Farmer took it upon herself—in league with the City officials concerned about Mr. Pham's ethnicity—to devise at an illegal meeting of the PC three new arbitrary criteria to justify denial of the Pham/Wasserman Application. And hence we have the discriminatory "3 Farmer Factors" that carried the day on November 17.

And then the BOC on December 5, 2016—despite being alerted to the foregoing facts by undersigned counsel for Appellant by both letter and oral presentation—effectively ratified and adopted the 3 Farmer Factors on December 5 by voting "to adopt the recommendation of the PC"—the same night that it approved

two other poultry houses equal protection "comparators" that flunked those very same criteria.

And, of course, the relevance of the clear departure from that past uniform County practice in this equal protection case—which the Appellee seeks to obfuscate—should be obvious.

It is said that a "class of one" theory of the denial of equal protection applies especially when there is "a clear standard against which departures, even for a single plaintiff, [can] be readily assessed." Engquist v. Or. Dep't of Agr., 553 U.S. 591, 602, 128 S.Ct. 2146 (2008).

Also, to prove that a zoning decision was based on intentional racial discrimination, a plaintiff must "establish that race played some role" in the decision, as per Sofarelli v. Pinellas County, 931 F.2d 718, 722 (11thCir. 1991), which can also be based on departures from past practice:

> Because explicit statements of racially discriminatory motivation are decreasing, circumstantial evidence must often be used to establish the requisite intent. Among the factors that are instructive in determining whether racially discriminatory intent is present are: discriminatory or segregative effect, historical background, the sequence of events leading up to the challenged actions, **and whether there were any departures from normal or substantive criteria.** United States v. Housing Authority of the City of Chickasaw, 504 F.Supp. 716, 727 (S.D.Ala.1980) (*citing* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)); *see also* United States v. City of

Birmingham, Mich., 727 F.2d 560, 566 (6th Cir.1984) (articulating same test).

And in Hallmark Developers, Inc. v. Fulton Cty., Ga., 466 F.3d 1276, 1283–86 (11th Cir. 2006) (emphasis added), the Eleventh Circuit reasoned as follows:

> For the sake of discussion, **we also accept that a plaintiff may demonstrate intentional discrimination if the "decision-making body acted for the sole purpose of effectuating the desires of private citizens, that racial considerations were a motivating factor behind those desires, and that members of the decision-making body were aware of the motivations of the private citizens."** *United States v. Yonkers,* 837 F.2d 1181, 1225 (2d Cir.1987); *see also United States v. City of Black Jack, Missouri,* 508 F.2d 1179, 1185 n. 3 (8th Cir.1975); *Jackson v. City of Auburn*, 41 F.Supp.2d 1300, 1311 (M.D.Ala.1999) ("If ... a zoning board's response to political pressure amounts to implementation of local residents' discriminatory impulses, then the board's actions may give rise to a cause of action for intentional discrimination.").

Continuing its analysis, the Eleventh Circuit in Hallmark observed as follows:

> Next, Hallmark produced evidence that the Board departed from customary procedures in ignoring the recommendations of approval from its staff and planning bodies and in holding three hearings. Such "procedural abnormalities are only relevant within a larger scope." *Macone,* 277 F.3d at 6. **Here, there is no context that renders this deviation suspect. The procedural departures are explainable as a response to community concern. . . . Here, with no racial animus expressed to the Board, bowing to political pressure does not demonstrate racial animus.**

Id. (emphasis added).

By contrast, as the Trial Court noted below, the racial animus expressed at the initial PC hearing, the subsequent illegal meeting of the PC that produced the Farmer Factors, the Farmer Factors themselves, *etc.*—all rendered suspect the unprecedented deviation from past practice in this case.

And with reference to that uncharacteristic rejection by the PC and BOC of the recommendation for approval by the Planning Director, Appellee argues that the denial was "based on the Criteria to Consider for Conditional Uses [*i.e.*, Section 503(7) & 1607] and the fifteen (15) purposes outlined in the Preamble and the Enactment Clause of Appellant's Zoning Regulations. (V2-671-676)." Brief of Appellee, p. 10.

In fact, there has never been a claim that Mr. Phillips incorrectly determined that the Pham/Wasserman Application satisfied the applicable CUP objective criteria, with the result that Appellee seeks here to ignore the arbitrary and decisive Farmer Factors and to justify the PC's recommendation of denial on the basis of the aforesaid "Preamble and Enactment Clause."

Concerning those so-called Preamble Purposes invoked by Appellee as additional justification for the denial of the Pham/Wasserman Application, the version attached to the minutes of the November 17 PC meeting omits the

concluding paragraph.[1] As seen below, that paragraph provides that all of those general purposes are controlled by the Comprehensive Plan of Franklin County, and

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[1] The referenced Preamble Purposes read as follows:

> Pursuant to the authority conferred by the 1983 Georgia State Constitution, Article IX, Section 11, Paragraph IV, and for the purpose of promoting health, safety, convenience, order, prosperity and general welfare of the present and future inhabitants of Franklin County and the State of Georgia, including among other purposes:
>
> 1. Promoting such (a) distribution of population, (b) classification of land uses, (c) distribution of land uses, and (d) land development and land utilization, as will tend to protect and promote desirable living conditions and the sustained stability of neighborhoods;
> 2. Preventing the overcrowding of land and avoiding both undue concentration of populations and urban sprawl;
> 3. Conserving and protecting the County's precious natural resources, while encouraging the efficient management of their uses;
> 4. Preserving buildings, structures and uses in areas having national, regional, state or local historic or environmental significance;
> 5. Protection our farm lands and open spaces by classifying the so that the farmers and landowners can continue their family operations and are not pressured to sell them;
> 6. The lessening of congestion on the streets;
> 7. Protecting property against blight and depreciation;
> 8. Maintaining the value of buildings;
> 9. Facilitating the adequate provision of transportation, water, sewerage service, schools, parks, and other public requirements;
> 10. Improving the aesthetic appearance of the County;
> 11. Securing safety from flood, fire, panic and other dangers;
> 12. Promoting health and general welfare;
> 13. Providing plentiful light and clean air;
> 14. Securing economy in governmental expenditures;
> 15. And encouraging the most appropriate use of land and structures throughout Franklin County.

this Court has frequently held that consistency with the applicable local Comprehensive Plan is a hallmark of the "rationality" of any local zoning decision. And, as per Item (10) of §1607, the Planning Director in his recommendation of approval of the Pham/Wasserman Application had already found that it was fully consistent with the Franklin County Comprehensive Plan. And that enhanced the perceived imperative for Chairman Farmer to create the 3 Farmer Factors out of whole cloth.

In short, despite the provisions in the Zoning Procedures Act ("ZPA") that henceforth the policy "standards" for granting conditional or special use permits should be expressly set out by the governing authority in the local ordinance, see O.C.G.A. §§ 36-66-3(4)(E) & 36-66-5(b), Franklin County takes the position—presumably pursuant to its constitutional Home Rule authority—that the BOC has properly delegated broad policymaking authority to the PC entitling it to base its denial "on the fifteen (15) purposes outlined in the Preamble and Enactment Clause of Franklin County's Zoning Regulations."

But the ZPA requirement for published "standards" to govern the exercise of discretion in the land use context, echoes previous due process holdings by this

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All in accordance with a Comprehensive Plan for the development and conservation of Franklin County, the County Commission does hereby ordain and enact into law the following Articles and Sections.

Court. See, e.g. Hixon v. Walker Cty., 266 Ga. 641, 641-42, 468 S.E.2d 744 (1966) ("The only authority cited for the denial of the applications was those sections of the Regulations which generally provided . . . the 'Purpose' thereof[.] . . . The 'Purpose' sections appear only in the preamble of the Regulations and there is no cross-reference to those subsequent sections of the Regulations which address the substantive requirements for obtaining a building permit. . . . The 'Purpose' sections of the Regulations contain no standard to control the discretion of the Planning Commission. It follows that . . . it would violate due process to rely upon the 'Purpose' sections of the Regulations as a substantive basis for the denial of the . . . application for the building permits" (punctuation omitted)); FSL Corp. v. Harrison, 262 Ga. 725, 425 S.E.2d 276 (1993); and Crymes v. DeKalb Cty., 258 Ga. 30, 30-31, 364 S.E.2d 852 (1988).

In short, the vague "general goals and purposes" in the preamble to a zoning ordinance violate due process if utilized as a substantive basis for the denial of a permit application, since the exercise of discretion in the issuance of permits "must be tempered with 'ascertainable standards . . . by which an applicant can intelligently seek to qualify for a [permit] . . .." Arras v. Herrin, 255 Ga. 11, 12, 334 S.E.2d 677 (1985).

Given that the BOC was put on notice on December 5, 2016, of the alleged misdeeds of its subordinate PC officials, its decision in this case to rubberstamp[2] and adopt the PC's recommendation of denial—and not to look into the allegations of racial discrimination by Appellant's counsel by examining any recordings of those earlier PC meetings and/or interviewing those involved—established the "requisite degree of culpability" under Section 1983, since it acted with at least "deliberate indifference" to the consequences of its actions and served as "the conduit of a subordinate's improper motives" to which it had been alerted. See Gold v. City of Miami, 151 F.3d 1346, 1351 n. 10 (11thCir.1998) and Wilson v. Tillman, 613 F. Supp. 2d 1254, 1265 (S.D. Ala. 2009). See footnote 2, supra.

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[2] If in this case, as alleged, the PC effectively made the final decision to deny the Pham/Wasserman Application and was influenced to do so by the racial intolerance expressed by the citizens of Carnesville, subject only to rubber stamping at a higher level, the County may be held liable for the PC's racially-discriminatory actions. See, *e.g.*, Templeton v. Bessemer Water Serv., 154 Fed.Appx. 759, 765–66 (11thCir. 2005) (reversing a summary judgment for a city on a § 1983 claim based on evidence that the mayor, who made the decision at issue, was "in de facto control" of the decision and the city's governing body "treated his approval on the matter as final"); Kamensky v. Dean, 148 Fed.Appx. 878, 880–81 (11thCir. 2005) (citing Quinn v. Monroe Cnty., 330 F.3d 1320, 1327 (11thCir. 2003), and stating that "a final policymaker may serve as the conduit of a subordinate's improper motive if he merely 'rubber stamps' the subordinate's recommendation"); and Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 1293 (11thCir. 2004) (citing Bowen v. Watkins, 669 F.2d 979, 989 (5thCir. 1982) ("If a higher official has the power to overrule a decision but as a practical matter never does so, the decision maker may represent the effective final authority on the question.")).

ARGUMENT OF LAW AND CITATION OF AUTHORITIES

Notwithstanding the strictures of Rule 45, the specific issues the Court directed the parties to address, and the responsive argument put forth in the Brief of Appellant, here the Briefs of Appellant and Appellee are like two ships passing silently in the night. Appellee does not deign to specifically acknowledge, address, or challenge the legal argument advanced in Appellant's Brief; and its own argument is difficult to pin down.

For instance, in Section I.A. Appellee seems to say that the "constraints of Article III" do not apply to state courts, presumably referring to the prudential doctrines developed by federal courts under Article III that arise out of considerations of federalism and comity unique to the federal courts, but Appellee does not address Appellant's Article VI argument under the Supremacy Clause.

Similarly, when addressing in Section I.A. the doctrine of associational standing that has been embraced and recently reaffirmed on state grounds by this Court, Appellee emphasizes that Mr. Pham was not a "community stakeholder" for purposes of invoking that standing doctrine, since he was not a citizen, resident, taxpayer, or voter in Franklin County. And, as a result, Appellee concludes rather strangely that Mr. Pham would not himself have been able to assert a claim based on the failure of Franklin County to enforce its own Zoning Ordinance in a constitutional and non-discriminatory fashion—that is, if Mr. Pham had suffered no

individualized injury. And then, extraordinarily, despite the fact that Mr. Pham had a contract to acquire the Wasserman Property, Appellee explains its implicit assumption that in fact Mr. Pham suffered no cognizable individualized injury since "[a] plaintiff who has no estate or interest in real property has not standing because he can show no substantial interest in a zoning decision." Stuttering Found., Inc. v. Glynn Cnty, 301 Ga. 492, 496-97 (2017) . . .." Brief of Appellee, p. 14.

Of course, because Mr. Pham had a legally-enforceable contract to acquire the Wasserman Property, he did have legal standing based on established Georgia appellate law to challenge the denial of the CUP Application he filed on behalf of himself and Ms. Wasserman as the landowner.

In terms of associational standing, therefore, the much more interesting question is whether Ms. Wasserman as a citizen, resident, taxpayer, and voter in Franklin County enjoyed associational standing to require that Franklin County adhere to its legal duty to administer its Zoning Ordinance consistently with the Equal Protection Clause of the Fourteenth Amendment.

And, concerning Ms. Wasserman's Equal Protection claim, it is noteworthy that Appellee repeatedly takes Appellant to task for "fail[ing] to properly challenge the BOC's decision through mandamus or writ of certiorari." Brief of Appellee, pp. 6 & 13.

In fact, Ms. Wasserman did attempt to challenge the BOC's decision by *mandamus* (V2:37). But, prior to the Trial Court's hearing on Appellee's Motion to Dismiss on February 15, 2019, there were two seismic shifts in Georgia law. First, after this case was filed and repudiating retroactively its prior decisions affirming that "mandamus" was the proper procedural remedy for Appellant to follow, this Court determined *certiorari* to be the exclusive and universally-available remedy for review of so-called "quasi-judicial zoning decisions." See City of Cumming v. Flowers, 300 Ga. 820, 797 S.E.2d 846 (March 6, 2017). By then it was too late for Appellant to pursue *certiorari*.

Secondly, this Court then held three months later in Lathrop v. Deal, 301 Ga. 408, 409, 801 S.E.2d 867, 869 (2017), that the constitutional doctrine of sovereign immunity in Georgia, which applies to Counties like Franklin, bars suits for official actions that are alleged to have been unconstitutional, including all due process and equal protection claims, but with the exception of a "just compensation" taking claim. Id 301 Ga. at 427-427, 801 S.E.2d at 880-881. And Appellee then amended its Motion to Dismiss on the basis of Lathrop and sovereign immunity in late 2018. At the hearing on February 15 Appellant immediately announced her acquiescence in the new reality, *i.e.*, that when she filed her Complaint on January 4, 2017, she effectively had no known or viable state remedies for her constitutional claims.

In response, this Court entered its February 28, 2019, Order, wherein it ruled as follows:

> The Court finds that Defendants are entitled to sovereign immunity as to all of Plaintiff's state law claims. Therefore, the Court **Dismisses** Plaintiff's state law claims, including the claim for attorneys fees and litigation costs pursuant to O.C.G.A. § 13-6-11.

At the same time the Trial Court denied Franklin County's Motion to Dismiss Plaintiff's allegations pursuant to the Civil Rights Act of 1871, 42 U.S.C. §§ 1983 & 1988.

In Section I.B.1. of its Brief, Appellee—without ever addressing Appellant's principal argument that Georgia Courts are bound to apply federal standing jurisprudence in the context of Section 1983 actions—assumes "arguendo" that the Georgia Courts have adopted both "the federal test on associational standing," see Aldridge v. Ga. Hosp. & Travel Assn., 251 Ga. 234, 304 S.E.2d 708 (1983), and the federal test for third-party standing in Feminist Women's Health Ctr. v. Burgess, 282 Ga. 433, 434-35, 651 S.E.2d 36, 39 (2007). Brief of Appellee, p. 18.

Accordingly, in Section I.B.2. of its Brief, Appellee goes on to conclude that under both the analogous Georgia and federal standards for third-party standing Appellant Wasserman does not qualify. Brief of Appellee, pp. 19-21.

In particular, Appellee argues that Ms. Wasserman's contract to sell her property to Mr. Pham and his eventual formal assignment to her of the Rezoning

Application prior to the final zoning hearing before the BOC—and his and his real estate agent's collaboration with her and her counsel on their joint strategy for bringing to the attention of the BOC Mr. Pham's claims of racial discrimination based on the Farmer Factors and other arbitrary actions by the PC at the behest of the biased citizens and officials of Carnesville did not create "some sort of vendor/vendee or 'close' relationship" or "contractual privity" between the two—concluding, without explanation, that "there is no evidence to support Appellant's conclusory arguments." Brief of Appellee, p. 19 & n. 2.

Instead, Appellee rotely adopts the nonsensical conclusions by the Court of Appeals (i) that Ms. Wasserman did not suffer an "injury in fact," despite her loss of a valuable contract predicated on a transitory and urgent market need for more poultry houses in northeast Georgia, because her alleged injury in fact, *i.e.*, loss of the sale of the property, is "a claim separate from, an incidental to, [the] one Mr. Pham could assert for racial discrimination based on a protected class"; (ii) that Ms. Wasserman did not have a sufficiently close relationship to Mr. Pham personally "such that she could represent his interests/no agency relationship exists"; and (iii) that there has been no showing that "Mr. Pham was somehow unable to protect his own interest," despite the fact that because of the extraordinary intervention of Planning Commission Chairman Farmer with Mr. Pham's poultry integrator, Wayne Farms, which then warned Mr. Pham that if the BOC followed the recommendation

of Chairman Farmer and the PC, Wayne Farms would not rock the boat and would instead withdraw its financial support for Mr. Pham to pursue any poultry houses in Franklin County, but would help him buy and build elsewhere—as it in fact did. Brief of Appellee, pp. 20-21.

WHEREFORE, this Court should reverse the Court of Appeals, and remand the case to the Trial Court.

Respectfully submitted this 13th day of September, 2024.

This submission does not exceed the word-count limit imposed by Rule 20.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing REPLY BRIEF OF APPELLANT upon counsel of record for Appellee, by filing a true and correct copy thereof through the efile system utilized by this Court and by depositing a true copy of the same in the United States Mail, postage prepaid, addressed as follows:

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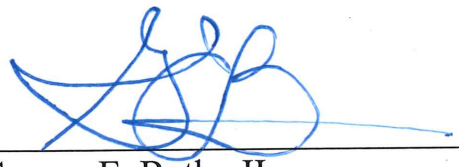
This 13th day of September, 2024.



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