

Memo

To: Board of Mayor and Commissioners, City of Avondale Estates
From:  Robert E. Wilson, City Attorney, and Stephen G. Quinn, Esq. 
Cc: Ken Turner, Interim City Manager
Date: August 21, 2018
Re: **Standard of Review When BOMC Hears Appeal from a Decision of the Architectural Review Board**

The Board of Mayor and Commissioners (“BOMC”) will hear an appeal from the recent decision by the Architectural Review Board (“ARB”) to deny the application related to the proposed “Alexan Gateway” project in the central business district. We have been asked to advise the BOMC regarding what standard of review to apply in this appeal.

The City has received a letter from respected resident and attorney Alan Harvey, in which Mr. Harvey opines that the “abuse of discretion” standard applies to this appeal. Mr. Harvey is correct about that. Mr. Harvey goes on to say that this is a “very high standard to meet” such that a determination made by the ARB cannot be overruled by the BOMC “unless you can point to a ‘clear abuse of discretion’ including that there was no evidence to support any portion of the ARB decision.” Mr. Harvey is incorrect, however, in this conclusion because he fails to take into account important aspects of zoning law, Georgia constitutional law and the limited discretion of the ARB.

The Abuse of Discretion Standard

The Georgia Supreme Court has observed “the standard of review [in cases involving the ‘abuse of discretion’ term] has not been stated consistently by either the Supreme Court or the

Court of Appeals. Reed v. State, 291 Ga. 10, 13 (2012).¹ The abuse of discretion standard “is a deferential standard of review [but] it is not toothless.” Jones v. Brown, 299 Ga. App. 418, 419 (2009). Upon a close review of cases applying the abuse of discretion standard, it is clear that the review standard varies depending on the amount of discretion vested in the court or other body that rendered the decision being appealed.

When a trial court has broad discretion to decide an issue, the abuse of discretion standard is a very high standard of review indeed. This is seen in the cases cited by Mr. Harvey: Williams v. State, 328 Ga. App. 876 (2014), is an appeal from a superior court’s decision to exclude evidence and Reed v. Reed, 289 Ga. 193 (2011), is an appeal from a superior court’s decision to award child custody. Both of these appeals involved decisions by a superior court with equity jurisdiction that was vested with “broad discretion” or “very broad discretion” to decide the matter that was appealed.² We respectfully disagree with Mr. Harvey that such superior court decisions are analogous to decisions of the ARB. The ARB is not a court and has no equity jurisdiction.

Where the decision being appealed was made by a body that has limited discretion, the abuse of discretion standard is much more easily met. For example, the Georgia Supreme Court strongly suggested in a recent case that a decision by a board of zoning appeals whose discretion is “tightly controlled by ordinance” can be reversed on an abuse of discretion standard “because it was wrong” in applying the facts of a variance application to the standard set out in the ordinance. City of Cumming v. Flowers, 300 Ga. App. 820, 825 (2017). This recent decision by the Supreme Court is much more relevant to the situation presented here than cases involving appeals from superior courts. In order to determine the standard of review for a decision made

¹ The abuse of discretion standard is “at least slightly less differential than the ‘any evidence’ standard” suggested by Mr. Harvey. Beasley v. Paul, 223 Ga. App. 706-707 (1996). The abuse of discretion standard is not identical to the “clearly erroneous” standard. Reed v. State, supra. The clearly erroneous standard has a fixed meaning which is equivalent to the highly deferential “any evidence” test. Patel v. Patel, 285 Ga. 391 (2009).

² A trial court has “broad discretion” in deciding whether to admit or exclude evidence. Landry v. Walsh, 342 Ga. App. 283 (2017). A trial court has “very broad discretion” to determine child custody. Taylor v. Taylor, 293 Ga. App. 615 (2013).

by the ARB, we must examine the ARB's legal character and determine how much discretion it has been vested with by the BOMC.

The ARB is an Administrative Agency

It is imperative to understand that the Georgia Constitution vests the BOMC, as the elected governing body, with the exclusive power of zoning within the City limits. *Humthlett v. Reeves*, 212 Ga. App. 8, 13 (1955). It is also important to note that zoning is a legislative power to set policy under the Georgia Constitution and the Constitution prohibits delegation of the legislative power to set zoning policy to any entity other than the elected governing body. *LaFave v. City of Atlanta*, 258 Ga. App. 631 (1988). The ARB was created by the City's zoning ordinance to administer certain aspects of that zoning ordinance. The ARB is not required to exist by state law, nor is it given any authority by state law. The ARB is purely a local body created by the BOMC.³ In its ordinance creating the ARB, the BOMC reserved to itself the authority to hear appeals from decisions of the ARB. Thus, the ARB is an agent (i.e., agency) of the BOMC.

“An administrative agency is a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication or rule making.” *Bentley v. Chastain*, 242 Ga. 348, 350 (1978) (internal citations omitted). The ARB is clearly not a court nor is it a legislative body under the Georgia Constitution. Therefore, the ARB is an administrative agent or agency. The Georgia Supreme Court has established that “in reviewing administrative decisions [the review should] evaluate the extent of discretion delegated to that agency and see that the agency acts within the limits of its discretion.” *Bentley v. Chastain* at 351. This is the real question presented here.

Since legislative zoning power cannot be delegated to an administrative body such as the ARB, any discretion that it is given must be “tightly controlled” by an ordinance or the administrative agency would be unconstitutional. *LaFave v. City of Atlanta*, *supra*. The City's zoning ordinance complies with the Constitution by tightly controlling the ARB's authority with

³ In this way the ARB is distinguished from the City's Historic Preservation Commission, which is specifically authorized and empowered by O.C.G.A. Section 44-10-1 *et. seq.*

specific standards for issuing a “certificate of approval.” In light of the constitutional limitation on administrative agencies, the Georgia Supreme Court described the Gwinnett County Zoning Board of Appeals (an agency similar to the ARB) as a body that “exercises virtually no discretion.” *Button Gwinnett Landfill, Inc. v. Gwinnett County*, 256 Ga. App. 818, 820 (1987). It is axiomatic that when a body has virtually no discretion, versus broad discretion, its discretion may easily be abused.

We recognize that §1522 of the City’s zoning ordinance uses the words “abused its discretion” when referring to the ARB. Nonetheless, a high standard of review does not apply when ARB decisions are appealed to the BOMC because the Georgia Constitution does not allow the ARB to have more than very little discretion. The City’s zoning ordinance, including the words “abused its discretion” in §1522, must be construed in a way that is constitutional. In this case, the Georgia Constitution requires that the zoning ordinance must be construed to reserve the discretionary authority to set zoning policy to the BOMC. We are guided by the Georgia Supreme Court’s strong suggestion that an administrative agency may be reversed on the abuse of discretion standard “because it was wrong” in applying the facts of an application to the ordinance that “tightly controlled” its discretion. *City of Cumming v. Flowers*, *supra*.

Conclusion

The ARB is not a policy-making body, for it legally cannot be one. As an unelected administrative agent of the BOMC, the ARB’s discretion is strictly limited under the Georgia Constitution. We cannot endorse an interpretation of the City’s zoning ordinance that would vest the ARB with a greater level of discretion than that of the BOMC because such an ordinance would be unconstitutional. Therefore, the ARB abuses its discretion when it makes a “wrong decision” that misapplies the plans presented by an application to the relevant ordinances and guidelines adopted by the BOMC. Thus, the BOMC’s role in an appeal from an ARB decision is to determine whether the ARB was “right” or “wrong” under such criteria. Any ARB decision that the BOMC determines to be “wrong” should be reversed on appeal.