

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas**

Judge W. Jeffrey Young, Lexington County

Case No. 2012-212228

Tobacco Merchant,

Appellant

v.

**City of Columbia Zoning Administrator,
Board of Zoning Appeals and City of Columbia**

Respondent

APPELLANT'S FINAL BRIEF

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- 4. THAT THE BOARD ERRED IN RULING THAT THE BOARD ERRED IN RULING THAT THE TOBACCO MERCHANT WAS A DRINKING ESTABLISHMENT SINCE THE RULING VIOLATED THE APPELLANT'S EQUAL PROTECTION AND DUE PROCESS RIGHTS.**
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STATEMENT OF ISSUES ON APPEAL

- 1. THE CIRCUIT COURT ORDER SHOULD BE REVERSED SINCE THE TOBACCO MERCHANT SHOULD NOT BE RULED A DRINKING ESTABLISHMENT SINCE THE CITY ORDINANCE AND STATE LAW PROVIDE SPECIFICALLY THAT THE SALE OF BEER AND WINE IS SUBORDINATE TO THE PRINCIPAL USE AND INCIDENTAL TO THE SALE OF TOBACCO PRODUCTS.**
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5. THE CIRCUIT COURT ERRED BY AFFIRMING THE BOARD'S RULING THAT THE TOBACCO MERCHANT IS A DRINKING ESTABLISHMENT SINCE THE RULING WAS EFFECTIVELY A TAKING WITHOUT COMPENSATION.

6. THE CIRCUIT COURT ERRED BY AFFIRMING THE BOARD'S RULING SINCE THE BOARD ERRED BY NOT MAKING A DECISION AT ALL AS A RESULT OF A TIE VOTE AND RELYING ON THE ZONING ADMINISTRATOR'S DECISION.

STATEMENT OF FACTS

The Tobacco Merchant is a retail tobacco store. William and Jackie Slicer purchased the business in 2009. After purchasing the business, the owners sought approval from the City Zoning and Business Licensing Divisions, to sell tobacco products and incidental sale of beer and wine in 2009. The Slicers fully informed the city officials they intended to sell beer and wine. After submitting the Business License Clearance Form, the City of Columbia approved the Tobacco Merchant's license as a Cigar Lounge. The owners of the Tobacco Merchant subsequently expended thousands of dollars to expand and modify their establishment.

On September 16, 2009, the Zoning administrator cited the Tobacco Merchant for operating a drinking establishment without obtaining a special exception. The Tobacco Merchant appealed to the Zoning Board which heard the case on two occasions January 12, 2010 and February 2010. After the final hearing on February 9, 2010 the Board vote ended in a tie. Three board members agreed with the administrator and three agreed that the Tobacco Merchant was not a bar but a tobacco store. The administrative rules of the board state that the administrator's ruling would be affirmed if the board vote was a tie. Based on this decision the Tobacco Merchant appealed to the Circuit Court on the following grounds:

- 1) That the Board erred in ruling that the Tobacco Merchant should be ruled a drinking establishment since the city ordinance and state law provide specifically that the sale of beer and wine is subordinate to the principal use and incidental to the sale of tobacco products.
- 2) That the Board erred in their final decision by making no specific Findings of Fact and Ruling of Law as required by city ordinance and state law.

- 3) That the Board erred by not making a decision at all as a result of a tie vote and relying on the zoning administrator decision. That the ruling based on a tie vote is unconstitutional and illegal and effectively no decision.
- 4) That the Board erred in ruling that the Tobacco Merchant is a drinking establishment since the city was estopped from requiring a special exception for drinking since the city approved the original business license and appellant relied upon the city license to establish their business.
- 5) That the Board erred in ruling that the tobacco merchant was a drinking establishment since the ruling violated the appellant's equal protection and due process rights.
- 6) That the Board erred in ruling that the Tobacco Merchant is a drinking establishment since the ruling was effectively a taking without compensation.

ARGUMENT

- I. **The Circuit Court erred in ruling that the Tobacco Merchant should be ruled a drinking establishment since the city ordinance provides that the sale of beer and wine is subordinate to the principal use, incidental to the sale of tobacco products and is an accessory use.**

The Tobacco Merchant is a retail tobacco establishment which has incidental sales of alcohol pursuant to the City of Columbia ordinance on smoking. The City of Columbia passed a smoking ban in 2008. The ban prohibits smoking in public buildings including bars and restaurants. City Ordinance Sec. 8-217 states the following:

Sec. 8-217. - Prohibition of smoking in the workplace.

(a)All employers shall provide a smoke free environment for all employees working in any work space or workplace as those terms are defined herein. Further, the employer

shall prohibit any persons present in any work space and workplace from smoking tobacco products therein.

(b) No person shall smoke or possess a lighted tobacco product in any work space and workplace.

This ban however permits tobacco retail establishments to have on site smoking, to sell tobacco products and sell items incidental to tobacco products. The city ordinance states the following:

Sec. 8-818 Exceptions

Notwithstanding the provisions of section 8-217 herein, smoking may be permitted in the following places or under the following circumstances:

(4) Retail tobacco stores as defined herein:

Sec. 8-816 Definitions

Retail tobacco store means any establishment which is not required to possess a retail food permit whose primary purpose is to sell or offer for sale to consumers, but not for resale, tobacco products and paraphernalia, *in which the sale of other products is merely incidental*, and in which the entry of persons under the age of 18 is prohibited at all times. *Sec. 8-216*

The Tobacco Merchant clearly follows the city's ordinance by selling beer and wine incidental to the sale of tobacco products. It is uncontested that the sale of beer and wine is incidental. The city admits that the sale of beer and wine is 10% of total sale as opposed to 90% for tobacco products. *See Video of Hearing February 9, 2010*

Moreover, the Tobacco Merchant is a retail tobacco establishment which has incidental sales of alcohol pursuant to the City of Columbia ordinance on accessory use. The appellant's sale of beer and wine is an accessory use pursuant to City Ordinance § 17-55. City Ordinance § 17-55 defines accessory use as follows:

Accessory building or use. An accessory building or use is:

- (1) Subordinate to and serves a principal building or principal use;
 - (2) Subordinate in area, extent or purpose to the principal building or principal use served;
 - (3) Designed for the comfort, convenience or necessity of occupants of the principal use served;
- and

(4) Located on the same lot as the principal building or principal use served, with the exception of such accessory off-street facilities as are permitted to locate elsewhere than on the same lot with building or use served.

Accessory uses shall include but not be limited to barns, sheds, home tennis courts, swimming pools, automobile garages, decks, patios and private recreation areas.

The evidence presented at the hearing prove that sale of beer and wine is an accessory use to the sale of tobacco at the Tobacco Merchant. First the sale of beer of wine is subordinate to the sale of beer and wine. As stated by Board member Hubbard the sale of tobacco is clearly a primary use as opposed to the sale of beer and wine which is an accessory. *See Video of Hearing February 9, 2010.*

Second the sale of beer and wine is subordinate in area, extent or purpose to the principal building or principal use served. As Board member Hubbard stated a small percentage of the floor is dedicated to this (beer and wine)” See video of hearing February 9, 2010. “The dog is tobacco and the tail is drinking and it fits in what the code is trying to say” *See Video of Hearing February 9, 2010* (statement from Board member Hubbard) Moreover the space dedicated specifically to drinking is 300 square feet out of a total square footage of 2,042 square feet. See Video of Hearing (statement by Board member Cromatie) Despite the Zoning administrator’s position that the Tobacco Merchant is primarily a drinking establishment. *See Video of Proceeding January 12, 2010* Even the Board Chairperson clarified that the sale of tobacco is the primary use of the Tobacco Merchant. *See Video of Hearing February 9, 2010.*

Third the sale of beer and wine at the Tobacco Merchant is designed for the comfort and convenience of the customer. Moreover tobacco retailers are allowed as a matter of course to sell beer and wine as an accessory in Lexington County, Richland County, City of Charleston and City of Greenville. This practice of selling beer and wine incidental to sale of tobacco in a tobacco retail store is common and accepted. Most importantly as detailed later neither the zoning administrator nor board addressed the issue of accessory use in written orders. Based

upon the facts, law and this argument the sale of beer and wine in this case is an accessory use and the circuit order should be reversed.

II. The Circuit Court erred in affirming the Zoning Board since the Zoning Board made no specific Findings of Fact and Ruling of Law as required by city ordinance and state law.

The Zoning Board made do findings of fact and ruling of law and therefore their decision should be reversed. A zoning board's findings of fact are final and conclusive on appeal and should be treated in the same manner as a finding of fact by a jury and the court may not take additional evidence. S.C.Code Ann. § 6-29-840(A) (Supp.2003). Appeal to the Circuit Court is only for a determination of whether the board's decision is correct as a matter of law. On appeal from the circuit court, the Zoning Board's decision should not be interfered with unless it is arbitrary or clearly erroneous. *Heilker v. Zoning Bd. of Appeals*, 346 S.C. 401, 406, 552 S.E.2d 42, 44 (Ct.App.2001); *Rest. Row Assocs. v. Horry County*, 327 S.C. 383, 389, 489 S.E.2d 641, 644 (Ct.App.1997).

In this case the Board' decision is nonexistent and does not consist of any specific finding of fact or rulings of law. City of Columbia Ordinance 17-113 addresses written orders by the Zoning Board and provides "*all findings of fact and conclusions of law shall be separately stated in final decisions or order of the board.*" South Carolina Code Section 6-29-800 also requires that "[a]ll final decisions and orders of the board must be in writing" and that "[a]ll findings of fact and conclusions of law must be separately stated" *S.C. Code Ann. § 6-29-800(F) (Supp. 2003)*.

This court opined that "[g]enerally, the format of a final decision is immaterial as long as the substance of the decision is sufficiently detailed so as to allow a reviewing court to determine if the decision is supported by the facts of the case." *Id.* at 494, 536 S.E.2d at 899; *cf. Massey v.*

City of Greenville Bd. of Zoning Adjustments, 341 S.C. 193, 201, 532 S.E.2d 885, 889 (Ct. App. 2000) (rejecting the use of transcript as final decision).

In the present case, the Board's written order articulated the following: "*Based upon your application, submitted documents, and testimony considered by the Board of Zoning Appeals at January and February 9, 2010 public hearing, and in accordance with §17-1139(a) of the Zoning ordinance, the Board of Zoning Appeals failed to approve your application for Administrative Appeal.*" See R. p.1.

Therefore, in this case the Zoning Board made no findings of fact or conclusions of law at all. Moreover, neither the Zoning Board nor the Zoning Administrator ever addressed the accessory use at all in their written decisions. See *Board Decision and Zoning Administrator's Written Notice*. See R. p. 1 and p. 68. This Court stated in *Austin v Board of Zoning* that:

"Our decision today, however, should not be interpreted as an indication that state and municipal agencies need not follow the mandate of section 6-29-800 and other statutory provisions requiring fully formed written final decisions. In the present case, the issue raised by Austin to the Board was limited to the narrow factual question of determining which of the two streets had a higher average traffic volume. While an exhaustive written decision may not be warranted when a narrow issue may be addressed succinctly by the Board, further detail will surely be required in more complicated cases. Indeed, thorough written findings and determinations eliminate potential confusion and ensure the will of the Board is accurately transmitted to the affected parties and reviewing courts."

Austin v Board of Zoning Appeals, 362 S.C. 29, 606 SE2d 209 (Ct. App. 2004)

In the present case the issues before the Zoning Board are much more complicated than those facing the Board in the *Austin* case. This case contains complicated issues that should have been addressed in a detailed order. There were a multitude of issues facing the City of Columbia Board of Zoning appeals: 1) whether the Tobacco Merchant is a drinking establishment, 2) whether the city is barred by estoppel to find the Tobacco Merchant a drinking establishment, 3) whether the sale beer and wine is an accessory use.

The written determination of the Board is confusing. The decision of the Board is confusing since there was a tie vote by the Board members and the Board's written order only states that the Appellant's appeal failed. See *Video of February 9, 2010 Hearing and Board's Order*. R. p.1 How can an appellate court make a determination whether there has been an error of law if the Board's finding of fact and rulings of law are not set forth in its opinion/order? In fact the video of the proceeding before the Board illustrate how complicated the issues were. See *Video of Hearings January 12, 2010 and February 9, 2010*. This case was heard on two separate occasions and ultimately the Board vote was a tie. See *Video of Hearings January 12, 2010 and February 9, 2010*

As this Court stated in *Massey v. City of Greenville*:

"However, the Board's decision recorded in the transcript cannot satisfy the legal requirements for a final decision. Section 6-7-740 requires that the Board's final decision be "in writing" with separate findings of fact and conclusions of law. Even if the transcript is considered a "writing," it is virtually indecipherable and does not contain separate findings of fact and legal conclusions. Therefore, the transcript does not meet the statutory requirements of a final decision." *Massey v. Greenville* 335 S.C. 202, 516 S.E.2d 439 (1999);

A one sentence decision by the Zoning Board based upon a tie vote is not sufficient to meet the statutory requirements for findings of fact and rulings of law. Clearly, the Board's order fails to follow the city ordinance or state law and is legally deficient and should be reversed.

III. The Circuit Court erred in ruling that the Tobacco Merchant is a drinking establishment since the city was estopped from requiring a special exception for drinking since the city approved the original business license and appellant relied upon the city license to establish their business.

The City of Columbia should be stopped from requiring a special exception for drinking since the city approved the business license and appellant relied upon the city to establish their business. A governmental body is not immune from the application of the doctrine of estoppel *where its officers or agents act within the proper scope of their authority* . . . The public cannot be estopped, however, by the unauthorized or erroneous conduct or statements of its officers or agents which have been relied on by a third party to his detriment. *DeStefano v. City of Charleston*, 304 S.C. 250, 257-58, 403 S.E.2d 648, 653 (1991) If estoppel is applicable against a government agency, a relying party must prove: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) justifiable reliance upon the government's conduct, and (3) a prejudicial change in position. *Grant v. City of Folly Beach*, 346 S.C. 74, 80, 551 S.E.2d 229, 232 (2001). The Tobacco Merchant sought approval from the City Zoning and Business Licensing Divisions, to sell tobacco products and incidental sale of beer and wine in 2009. The Slicers fully informed the city officials they intended to sell beer and wine. After submitting the Business License Clearance Form, the City of Columbia approved the Tobacco Merchant's license as a Cigar Lounge. See *Clearance Form*. R. p. 69. The owners of the Tobacco Merchant subsequently expended thousands of dollars to expand and modify their establishment. As previously stated the Tobacco Merchant relied upon the City in making substantial improvements to its business and relied upon the City's decision to allow them to serve beer and wine the City should be estopped from now asserting that they are a drinking

establishment. There no facts submitted by the City to support a position that any City official made a mistake.

IV. The Circuit Court erred in affirming the Board ruling that the Tobacco Merchant was a drinking establishment since the ruling violated the appellant's equal protection and due process rights.

The Equal Protection Clause provides: "No State shall .. deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Equal protection is satisfied if 1) the classification bears a reasonable relation to the legislative purpose sought to be effected; 2) the members of the class are treated alike under similar circumstances and conditions; and 3) the classification rests on some reasonable basis. *Skyscraper Corp. v. County of Newberry*, 323 S.C. 412, 475 S.E.2d 764 (1996); *Town of Hilton Head Island v. Fine Liquors, Ltd.*, 302 S.C. 550, 397 S.E.2d 662 (1990). The determination of whether a classification is reasonable is initially one for the legislative body and will be sustained if it is not plainly arbitrary and there is any reasonable hypothesis to support it. *Town of Hilton Head Island v. Fine Liquors, Ltd., supra*. "The fact that the classification may result in some inequity does not render it unconstitutional." *Davis v. County of Greenville*, 313 S.C. 459, 465, 443 S.E.2d 383, 386 (1994).

In this case evidence was presented that the city treated the Tobacco Merchant differently than other similarly situated businesses for example other retail establishments were allowed to sell beer and or wine without being subjected to city violations. Examples given at the Board hearings were other tobacco stores and retail beer and wine establishments. The city allows these establishments to sell beer and wine but does not pursue them for violations. The city's determination to prosecute some establishments and not others is a violation of the defendant's equal protection rights.

V. The Circuit Court erred in affirming the Board since the ruling that the Tobacco Merchant is a drinking establishment was effectively a taking without compensation.

Zoning Board's decision results in a taking of the Tobacco Merchant's property without just compensation in violation of the due process clause of the Fifth Amendment to the United States Constitution because the Board denies the owners an economically viable use of their property.

The Fifth Amendment to the United States Constitution prohibits the taking of private property "for public use, without just compensation." The takings clause applies to the states through the Fourteenth Amendment to the United States Constitution. "[T]he application of a general zoning law to a particular property effects a taking if the ordinance does not substantially advance legitimate [governmental] interests or denies an owner economically viable use of his land." *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106, 112 (1980) (*internal citations omitted*).

In this case, the zoning law as applied to the Tobacco Merchant is unconstitutional since it denies the owner an economic viable interest in his land. The city approved the license and the city should not be allowed at this point to damage the owner's economic interest.

VI. The Circuit Court erred in affirming the Board since the Board erred by not making a decision at all as a result of a tie vote and relying on the zoning administrator decision which denied the Appellant Due Process.

The Zoning Board's ruling is in essence no ruling at all should be reversed. The Zoning Board's administrative rule which allows for the zoning administrator's decision to effectively serve as the Board's decision is illegal and violates this defendant's due process rights.

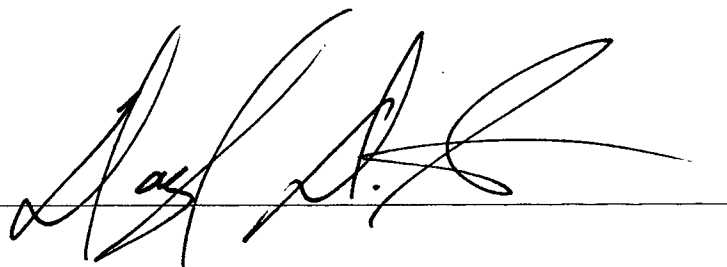
Columbia City Ordinance §17-112(1) provides that the Zoning Board *will hear and decide* appeals from decisions of the Zoning Administrator. An indispensable component of procedural due process is that the persons legally responsible for making a decision must be informed and unbiased. *See Garriss v. S.C. Reinsurance Facility*, 333 S.C. 432, 453, 511 S.E.2d 48, 59 (1998) ("Due process requires an administrative board, when acting in a quasi-judicial capacity, to consider all the evidence before deciding a particular question."). The Board of Zoning Appeals was set up under the city ordinances to provide and rule on appeals.

Generally, an administrative agency, board, or commission should act as a body, and, in the absence of a statutory exception, can act officially only in or at a lawfully convened session, if the act is one requiring deliberation or the exercise of discretion or judgment. Except where authorized by statute, the powers and duties of an administrative body may not be exercised by the individual members separately. *73 C.J.S. Public Administrative Law and Practice* §16 at 384-385 (1983). "In order to be the action of the board, the action must be that of the board as such and not merely the action of the individual members thereof" *101A C.J.S. Zoning & Land Planning* § 189 at 560 (1979). *See also 73A C.J.S. Public Administrative Law and Practice* §138 at 83 (1983) ("Where the legislature gives quasi-judicial powers to an administrative agency or officer, only the agency or person granted the authority may exercise it, and it has been held that a . . . decision by a person not authorized, notwithstanding approval by an administrative agency or officer, is without legal force and effect."); *56 Am. Jur. 2d §155 Municipal Corporations* § 155 (1971) ("[T]he powers of a municipal council or body must be exercised at a meeting which is legally called. Action of all the members of the council separately is not the action of the council, and an agreement entered into separately by the members of the council outside a regular meeting is not binding.").

By relying on the decision of the Zoning Administrator the Board basically abdicated its statutory duties. The Board's decision should be reversed and remanded.

CONCLUSION

Based upon the above referenced facts, law and arguments this defendant respectfully request that this court reverse the decision of the Circuit Court.

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Rule 211 Certification

The undersigned attorney certifies that the Final Brief complies with Rule 211(b).



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City Board of Zoning Appeals

Proof of Service

I, the undersigned, attorney for the appellant, do hereby certify that I have served counsel of record with **Appellant's Brief** by mailing a copy of the same by United States mail first class, to the following addresses:

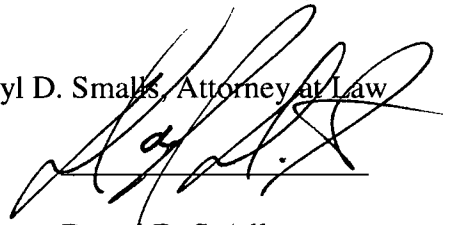
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