THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Judge W. Jeffrey Young, Lexington County

Appellate Case No. 2012-212228

Opinion No. 2014-UP-305 (S.C. Ct. App. filed July 30, 2014)

Tobacco Merchant, **Petitioner**

v.

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

PETITION FOR REHEARING OF APPELLANT TOBACCO MERCHANT

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TABLE OF CONTENTS

INTRODUCTION

Pursuant to Rule 221(a) and Rule 240 (i), SCACR the Appellant Tobacco Merchant respectfully petitions this Court for a rehearing of Opinion No. 2014-UP-305 dated, July 30, 2014. Rehearing is warranted when the Court has overlooked or misapprehended an argument. *Kennedy v. S.C. Retirement System*, 349 S.C. 531, 564 S.E. 2d 322 (2001). When the Court fails to address some of the arguments raised in the appeal, "a prima facie case for rehearing has been made." *Covar v. Sallat*, 22 S.C. 265, 272 (1885)

STATEMENT OF THE CASE

The Tobacco Merchant is a retail tobacco store. The Tobacco Merchant has been in existence for thirteen years. Bill 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. After the final hearing 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, which affirmed. On appeal this Court affirmed and the petitioner now seeks a rehearing.

ARGUMENT

1. The Court Appeals Opinion failed to address the Petitioner's argument 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.

The Court's opinion failed to address the Petitioner's argument that the Board erred by not making a decision at all because of a tie vote. The Zoning Board's ruling is in essence no ruling at all and 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. An indispensible component of procedural due process is that the persons legally responsible for making a decision must be informed and unbiased. *See Garris 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.").

In this case the Board vote on the Tobacco Merchant issue resulted in a tie. The Board then deferred to the Zoning Administrator's prior decision. 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 since the board failed to exercise its statutory duty.

2. The Court of Appeals Opinion misapprehends the Petitioner's argument that the Zoning Board erred in their final decision by making no specific finding of fact and ruling of law as required by city ordinance and state law.

The Court's Opinion addressing whether the final written decision of the Board is sufficient is confusing and misapprehends the Petitioner's argument. The Court's opinion states "generally,

the format of 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 decision is supported by the facts of the case." The Zoning Board made ***no*** findings of fact and ruling of law and therefore their decision should be reversed. 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).

Moreover, the Zoning Board's written orders are addressed in City of Columbia Ordinance 17-113 which 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).*

The 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) (considering use of transcript but rejecting in part because it was virtually indecipherable).

The City of Columbia's Zoning 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."

Therefore, in this case the Zoning Board made no findings of fact 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.* 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* 606 SE2d 209

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 faces the 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. 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 Proceedings* This case was heard on two separate occasions and ultimately the Board vote was a tie. *See Video of Proceedings* Clearly, the Board's order fails to follow the city ordinance or state law and is legally deficient and should be reversed.

3. The Court of Appeals Opinion misapprehends the Petitioner's argument the city is 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. 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. 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 know asserting that they are a drinking establishment.

4. The Court of Appeals' opinion misapprehends the Petitioner's argument 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

The Court of Appeals' opinion misapprehends the Petitioner's argument 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. 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.

5. The Court of Appeals' opinion misapprehends the Petitioner's argument that the Tobacco Merchant should not be ruled a drinking establishment since the city ordinance and state law provide specifically that that sale of beer and wine is subordinate to the principal use and incidental to the sale of tobacco products.

The Court's Opinion states the court will not reverse the Circuit Court affirmance of the zoning board unless the board's findings of fact have no evidentiary support or the board commits and error of law. As previously argued the Board's order cites no findings of fact at all to support their position. Moreover, the Board's failure to present any findings of fact in its order is an error at law. The undisputed facts are the Tobacco Merchant is a retail tobacco establishment, which has incidental sales of alcohol pursuant to the City of Columbia ordinance on smoking.

> *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.

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. The facts are that the Tobacco Merchant has followed and complied with the City's ordinance. The Board's order does not cite nor does the Court of Appeals Opinion cite any facts to support a position otherwise.

CONCLUSION

For the reasons stated, petitioner asks the Court to grant the petition for REHEARING

Respectfully submitted,

August 13, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on this date I served copies of the Petition for Rehearing of Appellant Tobacco Merchant on counsel for all parties by placing copies of same in the United States Mail, first-class postage prepaid, address to:

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