

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2013 CP 40-04051

Andreas Ganotakis, d/b/a Seven Days Food
Mart, LLC

City of Columbia Board of Zoning
Appeals

Plaintiff

Defendant

Submitted by: Plaintiff

Attorney for : Plaintiff Defendant
or
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.


Circuit Court Judge

2154
Judge Code

07/29/2014
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Dietrich A. Lake

Peter M. Balthazor

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)
Jeanette McBride

Court Reporter:

CLERK OF COURT

Jeanette W McBride

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
Andreas Ganotakis, d/b/a Seven)
Days Food Mart LLC)
)
Petitioner)
)
v.)
)
City of Columbia Board of Zoning)
Appeals)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
Civil Action No: 2013-CP-40-4051

ORDER
(MOTION FOR RECONSIDERATION)

2014 JUN 30 11:56 AM
CLERK OF COURT
RICHLAND COUNTY

THIS MATTER is before the Court upon a Motion for Reconsideration of this Court's affirmation of the Board of Zoning Appeals denial of the special exception request by the Petitioner, Andreas Ganotakis, d/b/a Seven Days Food Mart LLC.

The Court, being fully advised, finds that the Defendant's Motion for Reconsideration of this action pursuant to Rule 59 (e) of the South Carolina Rules of Civil Procedure is not well taken and is therefore **DENIED**.

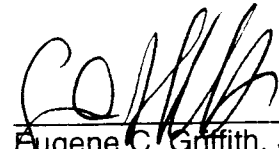
Upon the record, the Court finds:

1. The Court has jurisdiction of the parties and the subject matter herein;
2. The Petitioner timely filed a Motion for Reconsideration of this Court's Order of June 2, 2014, affirming the Board of Zoning Appeals denial of the special exception to the Petitioner;
3. It appears upon argument of counsel for reconsideration that this motion should be denied.

WHEREFORE IT IS HEREBY ORDERED AND ADJUDGED that the Motion for Reconsideration of the Court's Order of June 2, 2014 be **DENIED**.

SCANNED

IT IS SO ORDERED.



Eugene C. Griffith, Jr.
Presiding Judge
Fifth Judicial Circuit

July 29th, 2014
Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2013 CP 40-04051

Andreas Ganotakis, d/b/a Seven Days Food
Mart, LLC

City of Columbia Board of Zoning
Appeals

Plaintiff

Defendant

Submitted by: Defendant

Attorney for : Plaintiff or Defendant
 Self-Represented

JEANETTE W. HOPKINS
C.P. & G.S.
2014 JUN - 4 PM 3:30
RICHLAND COUNTY
FILED

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[Signature]
Circuit Court Judge

2154
Judge Code

06/2/2014
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 10 day of June 2011 to attorneys of record or to parties (when appearing pro se) as follows:

Dietrich A. Lake

Peter M. Balthazor

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Jeanette McBride

CLERK OF COURT

Court Reporter:

Jeanette W McBride

located in a C-3 zoning district. Liquor stores may be operated only pursuant to a special exception in C-3 zoning districts. City Code § 17-258.¹

A public hearing was held on the application for special exception on June 11, 2013. BOZA heard the evidence and arguments presented and then a motion was made to deny the request for special exception. The motion passed and BOZA issued its written order on June 27, 2013.

The Petitioner filed his Petition on July 14, 2013. The Petitioner raises two issues on appeal. First, the Petitioner argues that BOZA's decision to deny the request for a special exception was arbitrary and capricious where BOZA did not adhere to its own criteria for granting special exceptions. The Petitioner also argues he was prejudiced by a conflict of interest where an attorney appeared on behalf of the City Council to oppose the request for a special exception.

II. Standard of Review

This court's standard of review is governed by S.C. Code Ann. § 6-29-840(A) (Supp. 2013). This section provides in part that "[t]he findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence. . . . In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law." Id.

Section 6-29-840 is very deferential to a zoning board's findings of fact as it equates them to a jury's findings. Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals, 342 S.C. 480, 536 S.E.2d 892 (Ct. App. 2000). In other words, the court must not disturb the board's findings of fact unless there is no evidence reasonably supporting the board's decision.

¹ The City provided certified copies of applicable City Code sections at the hearing in this matter, including §§ 17-112, 17-240, and 17-258.

See Vaught v. A.O. Hardee & Sons, Inc., 366 S.C. 475, 479-480, 623 S.E.2d 373, 375 (2005) (“[A] factual finding of the jury will not be disturbed unless a review of the record discloses there is no evidence which reasonably supports the jury’s findings.”).

“Courts are bound to afford substantial deference to the decisions of those charged with interpreting and applying local zoning ordinances.” Clear Channel Outdoor v. City of Myrtle Beach, 360 S.C. 459, 465, 602 S.E.2d 76, 79 (Ct. App. 2004), *aff’d*, 372 S.C. 230, 642 S.E.2d 565 (2007). A court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision. Restaurant Row Assocs. v. Horry County, 335 S.C. 209, 516 S.E.2d 442 (1999).

III. Applicable Law/Analysis

Issue 1. Was BOZA’s decision arbitrary and capricious?

A zoning board has the power “to permit special exceptions subject to the terms and conditions for the uses set forth for such uses in the zoning ordinance” S.C. Code Ann. § 6-29-800(A)(3) (Supp. 2013). The City Code contains substantive provisions relating to the grant or denial of a special exception. The first of these, section 17-112(2)a.1., instructs BOZA to “[d]eny special exceptions when not in harmony with the intent and purpose of this article.” Next, section 17-112(2)b.4. states that BOZA “shall make a finding that it is empowered under the section of this article described in the application to grant the special exception and that the special exception will not adversely affect the public interest.” Therefore, if BOZA is unable to make this specific finding regarding public interest the special exception must be denied.

BOZA, pursuant to section 17-112(2)b.4., found that the special exception “would adversely affect the public interest due to the proximity to a middle school and the proliferation of liquor stores in the area.” There is evidence in the record to support BOZA’s determination

that the public interest would be adversely affected. It is undisputed that a middle school is located across the street from the proposed liquor store and a residential neighborhood is also across the street. BOZA heard testimony that children from the neighborhood walk to school and will walk right past the liquor store. The proximity of a liquor store to schools, children and neighborhoods is certainly a valid consideration in determining whether a special exception would adversely affect the public interest and whether the use is appropriate for a particular location.

BOZA also heard evidence of the number of liquor stores in the area and decided that such number would adversely affect the public interest. The evidence at the hearing showed that another liquor store was already located on the same side of the road and within view of the Petitioner's store. In addition to that store at least two other liquor stores are located within one mile of the middle school. Had the special exception been granted a total of four liquor stores would have been located within a one-mile radius of the middle school. The number of liquor stores in a particular area is a real and valid concern in the zoning context. This court is aware of no authority or reason that a zoning board cannot consider the number or concentration of a particular type of use in its evaluation to determine whether a special exception will adversely affect the public interest.

In addition to the physical evidence of the location of existing and proposed liquor stores, BOZA also heard testimony from a nearby neighborhood resident about the concentration of liquor stores. This witness stated that he had lived in the area for 8 years and had not seen any new business other than convenience stores and liquor stores.

The Petitioner argues that his position is identical to the applicant's position in Wyndham Enters., LLC v. City of North Augusta, 401 S.C. 144, 735 S.E.2d 659 (Ct. App. 2012). In

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Wyndham, the board denied a special exception request to operate a costume/fireworks store. The criteria used by the board, in pertinent part, in evaluating the request required the board to find: “2. That the special exception will be in substantial harmony with the area in which it is to be located. 3. That the special exception will not discourage or negate the use of the surrounding property for use(s) permitted by right.” Id. at 148, 735 S.E.2d at 662. The applicable city code also required the board’s decision to be supported by “competent, substantial, and material evidence.” Id. The board heard concerns about an increase in traffic, a decline in property values, and detrimental impact on the character of the surrounding area. The court of appeals held that the “testimony proffered was based on speculation and opinion.” Therefore, the court of appeals reversed the board’s decision, finding it was arbitrary and capricious.

The present case is clearly distinguishable from the matter considered by the board in Wyndham. The zoning board in Wyndham was not called upon to determine whether the special exception would adversely affect the public interest. The court of appeals in Wyndham was concerned with the basis of the testimony relied upon by the board. It found the “testimony proffered was based on speculation and opinion.” Id. at 151, 735 S.E.2d at 662. In the present case, BOZA was required to make a determination regarding the public interest. The testimony relied upon by BOZA was not based on speculation or opinion and there is no concern about the basis of the testimony provided to BOZA concerning proximity or concentration.

The Petitioner argues that BOZA’s decision was arbitrary and capricious because BOZA’s assertions regarding the adverse effect of the liquor store on the middle school and the proliferation of liquor stores in the area were merely opinion and conjecture and were not supported by any evidence in the record. This is an incorrect characterization of BOZA’s determination. Instead, BOZA determined that the public interest would be adversely affected

by the location of the proposed liquor store and because of the number of liquor stores in the area. The testimony that formed the basis of BOZA's determination regarding the public interest was not based upon speculation or conjecture.

In the present case, the testimony concerning the proximity of the proposed liquor store to a school and the number of liquor stores in the area was undisputed and was not based on speculation, opinion or conjecture. BOZA heard this evidence and determined, in its view, that the location of the proposed liquor store and the number of liquor stores in the area would adversely affect the public interest. Others viewing the same facts may come to a different conclusion than that reached by BOZA. However, based on the record, evidence was presented by which BOZA could reasonably conclude that the special exception would adversely affect the public interest. See Restaurant Row Assocs., 335 S.C. at 216, 516 S.E.2d at 446 (stating that a court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision).

The City Code also contains specific criteria for special exceptions in section 17-112(2)c. This section states that BOZA "shall consider the following: (1) traffic impact; (2) vehicle and pedestrian safety; (3) potential impact of noise, lights, fumes, or obstruction of air flow on adjoining property; (4) adverse impact of the proposed use on the aesthetic character of the environs, to include the possible need for screening from view; and (5) orientation and spacing of improvements or buildings.

In addition to its evaluation of the adverse effect to the public interest, BOZA evaluated the special exception application in this case under each of the above substantive rules governing special exceptions and found that the special exception use would "create vehicular or pedestrian safety problems" and that it would "impact the aesthetic character of the environs, especially in

regards to the proliferation of signs”² BOZA considered evidence as to each of these criteria. BOZA heard evidence of children walking along the sidewalks in front of the liquor store. BOZA also heard evidence concerning signage and posters inside and outside the business. BOZA determined, in its judgment, that the signage and posters impacted the aesthetic character of the environs. This court cannot substitute its judgment for that of BOZA where evidence is in the record supporting BOZA’s decision. Restaurant Row, supra.

In summary, the record provided to this court contains evidence reasonably supporting BOZA’s decision to deny the special exception. This court cannot concern itself with the quantum of evidence, and this court cannot substitute its judgment for that of BOZA. As such, under the applicable standard of review, BOZA’s decision must be affirmed.

Issue 2. Was the Petitioner prejudiced by an alleged conflict of interest?

Based on the record before this court, it appears that a private licensed attorney, retained specially by City Council, appeared at the BOZA hearing and spoke in opposition to the requested special exception. The Petitioner asserts that this constituted a conflict of interest and, further, that the conflict prejudiced the Petitioner.³ This court is unconvinced that a conflict of interest existed in this situation, and the Petitioner has not provided any case law or other authority demonstrating that a conflict of interest existed.

This court is unaware of any authority prohibiting a councilmember from appearing at a public hearing. BOZA hearings are advertised by public notice and are open to the public. S.C. Code Ann. § 6-29-800(D) (Supp. 2013). This court is likewise unaware of any authority

² BOZA also found that the use would not negatively impact traffic circulation, would not create noise, lights, fumes, or otherwise obstruct air flow, and that it would not negatively impact the orientation or spacing of improvements or buildings.

³ As the Petitioner recognizes in his brief, he did not object at the hearing to the comments and testimony provided by counsel appearing on behalf of the City Council. Therefore, this issue has been waived.

prohibiting a municipal body from engaging outside counsel to appear on its behalf at a public hearing. The Petitioner characterizes this situation as a conflict of interest, but the Petitioner does not explain who this conflict affects. The Petitioner does not suggest that the retained outside counsel had a conflict of interest. The Petitioner instead asserts that the City Attorney's office would have had a conflict of interest. Such a conflict of interest, if one existed in the first place, was remedied by the City Council hiring outside counsel who did not represent both the interests of the City of Columbia and the interests of the Board of Zoning Appeals. Moreover, this court cannot find a conflict of interest where the Local Government Comprehensive Planning Enabling Act (S.C. Code Ann. § 6-29-310 *et. seq.*) specifically allows "an officer or agent of the appropriate governing authority" to appeal a decision of the board to the circuit court. S. C. Code Ann. § 6-29-820(A) (Supp. 2013).

The Petitioner also asserts that the alleged conflict of interest prejudiced him in this matter. However, because the court finds that no conflict existed, there was no prejudice resulting to the Petitioner. In any event, the Petitioner has not alleged how he was prejudiced in this matter, other than being denied the special exception. As explained earlier, BOZA's decision was reasonably supported by the evidence. There is no evidence, and the Petitioner has not pointed to any, demonstrating that any board member voted a certain way because of the alleged conflict of interest.⁴

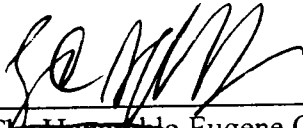
⁴ The Petitioner also asserts that a conflict existed or that he was prejudiced by the use of public money to hire outside counsel to represent the City's interest against a private citizen. The Petitioner does not explain how this would constitute a conflict of interest. However, it is not uncommon, and certainly not prohibited, for public money to be used to hire counsel to represent the City against private interests. Municipalities engage counsel regularly to, for example, pursue eminent domain actions against private interests and defend tort actions brought by private citizens.

Therefore, this court finds that there was no conflict of interest created by City Council hiring outside counsel to appear on its behalf at a BOZA meeting. Further, the Petitioner was not prejudiced by an attorney appearing on behalf of City Council at the hearing.

IV. Conclusion

BOZA's decision to deny the special exception in this matter is AFFIRMED.

IT IS SO ORDERED.



The Honorable Eugene C. Griffith, Jr.
Court of Common Pleas, 5th Judicial Circuit

June 2nd, 2014

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