

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

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Case No. 2014-002195

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**RECEIVED**

NOV 14 2014

**S.C. Supreme Court**

Tobacco Merchant ..... Petitioner,

v.

City of Columbia Zoning Administrator,  
Board of Zoning Appeals, and City of Columbia ..... Respondents.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## STATEMENT OF ISSUES ON APPEAL

1. Did the circuit court err in finding that the Zoning Board's tie votes, which had the effect of upholding the Zoning Administrator's decision to classify Tobacco Merchant as a drinking place, did not violate Tobacco Merchant's due process rights?
2. Did the court of appeals err in affirming the circuit court's determination that the Zoning Board's written decision was sufficient?
3. Did the court of appeals err in affirming the circuit court's determination that the City should not be estopped from finding that Tobacco Merchant would be required to obtain a special exception to operate a drinking place?
4. Did the court of appeals err in affirming the circuit court's determination that Tobacco Merchant is a drinking place and that Tobacco Merchant's beer and wine sales did not constitute an accessory use?
5. Did the circuit court err in finding that the Zoning Board did not violate Tobacco Merchant's equal protection and due process rights by classifying Tobacco Merchant as a drinking place?

## STATEMENT OF THE CASE

This is a zoning dispute. The issue in this case is whether Tobacco Merchant, a retail tobacco store, can sell beer and wine as an accessory use or whether it should be required to obtain a special exception to operate a drinking establishment.

In September 2009, the City of Columbia Zoning Administrator determined that Tobacco Merchant was using its property as a drinking place and that such use was not permitted by the City of Columbia Zoning Ordinance. (R. pp. 56-59, 68) Tobacco Merchant appealed the Zoning Administrator's decision to the Board of Zoning Appeals ("Zoning Board"). Tobacco Merchant argued that the Zoning Administrator improperly characterized its business as a drinking place.

The Zoning Board conducted two hearings and upheld the Zoning Administrator's determination that the Tobacco Merchant was operating as a drinking place. (R. pp. 184-189, 193-196) Drinking places are not permitted within the subject zoning district without first obtaining a special exception from the Zoning Board. Tobacco Merchant appealed the Zoning Board's decision to the circuit court.

The circuit court heard the appeal on February 13, 2012. On April 4, 2012, the circuit court denied Tobacco Merchant's appeal and affirmed the Zoning Board's decision, finding that Tobacco Merchant's beer and wine sales did not constitute an accessory use and that Tobacco Merchant was operating as a drinking establishment in violation of its zoning classification. (R. pp. 3-18) The circuit court also found that the zoning board's final written decision was sufficient, and that the City would not be estopped from requiring Tobacco Merchant to obtain a special exception for a drinking place based on the City's approval of a business license. In addition, the circuit court found that the Zoning Board's decision to classify Tobacco Merchant as a drinking place did not violate Tobacco Merchant's equal protection and due process right

and did not constitute an uncompensated taking. Finally, the circuit court found that the Zoning Board's tie votes did not violate Tobacco Merchant's due process rights.

Tobacco Merchant appealed the circuit court's order to the court of appeals. The court of appeals affirmed the circuit court's decision pursuant to Rule 220(b), SCACR. In so doing, the court of appeals reached the merits on the issues concerning: 1) whether Tobacco Merchant's beer and wine sales constituted an accessory use; 2) whether the Zoning Board's final written decision was sufficient; and 3) whether the City was estopped from requiring Tobacco Merchant to obtain a special exception. As to the remaining issues, the court of appeals found that the rulings were unchallenged and therefore constituted the law of the case.

Tobacco Merchant has now filed a petition for a writ of certiorari. In its petition, Tobacco Merchant essentially restates its earlier arguments as to the merits of the issues. However, Tobacco Merchant makes no attempt to argue that the court of appeals erred in finding that three of the issues were not preserved for review. One of the issues found by the court of appeals to be unchallenged – whether the determination that Tobacco Merchant was a drinking place was a taking – has not been addressed in any manner by Tobacco Merchant in its petition. Therefore, Respondents do not address the takings issue in this return.

## STATEMENT OF FACTS

Tobacco Merchant is a retail tobacco store located in the Harbison area of Columbia. It has operated at that location as a cigar and tobacco store since 1997. (R. pp. 23-24 *Videotape of January 12, 2010 hearing of City of Columbia Board of Zoning Appeals* at DVD marker 16:21.) In 2009, William and Jackie Slicer purchased the business and on April 22, 2009, they sought approvals to operate the business in the City. (R. pp. 56, 69) The Zoning Division approved the use of the business as a “cigar store/stand”, which is permitted in the C-3 zoning district where Tobacco Merchant is located. (R. pp. 69, 129)

The Zoning Division characterized the business with the use code of “5993” as found in its Table of Permitted Uses at section 17-258 of the City Code. (R. pp. 56, 69) This internal use code signifies businesses with the use of “cigar store and stands.” City Code, §17-258. (R. p. 257) According to the Table of Permitted Uses, cigar stores and stands are permitted in a C-3 district. (R. p. 257) A Zoning Permit was issued to Tobacco Merchant for a “Tobacco stand.” (R. p. 93)

On September 3, 2009, the Zoning Division received a complaint that the Tobacco Merchant was operating as a drinking place. (R. pp. 56, 129) A “drinking place” is defined as an “establishment engaged in the retail sale of drinks, such as beer, ale or wine for consumption on the premises.” City Code, § 17-55 (R. p. 230) It is undisputed that Tobacco Merchant is engaged in the retail sale of alcohol for on-premises consumption. The Zoning Division inspected the location and met with the business owner and his counsel regarding the complaint. The Zoning Division informed the owners of its view that the business was being operated as a drinking place without a special exception. (R. p. 57) A drinking place is permitted in a C-3 district only by special exception. City Code, §17-258. (R. p. 256)

The Zoning Division issued a Written Notice of Violation on September 16, 2009. (R. p. 68) The notice stated that the location was being operated as a drinking establishment without obtaining a special exception. The notice invited the owner to submit an application for a special exception.<sup>1</sup> (R. p. 68)

However, rather than apply for a special exception to operate as a drinking establishment, the owner appealed the Zoning Administrator's determination to the Zoning Board. (R. pp. 66, 186) Tobacco Merchant asserted that the Zoning Administrator was in error because "[t]he Tobacco Merchant legally operates as a tobacco retail establishment which has incidental sales [of alcohol] pursuant to the City of Columbia ordinances." (R. p. 66)

The Zoning Board first heard this matter on January 12, 2010. The Zoning Administrator stated his position that the business was being classified as a drinking place, in addition to its use as a tobacco stand, based upon the sale of alcohol and the amount of area in the building attributed to drinking. The Zoning Administrator stated that the sale of alcohol did not meet the definition of accessory use found in the Zoning Ordinance. This determination was based on the amount of area that is allocated to opportunities for drinking and the size of the bar, as well as advertisements for drinking located outside of the store. (R. pp. 54-55, 75, 77-79, 82, 130). At the time of this hearing there was no data available regarding sales. The Zoning Board remanded the matter to the Zoning Division in order to gather additional facts concerning sales figures, square footage, and customers' utilization of the business. (R. pp. 184-189)

After remand, the Zoning Board again heard the matter on February 9, 2010. The Zoning Administrator provided evidence that approximately 27% of the area of the business

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<sup>1</sup> Tobacco Merchant rightly understood that to obtain a special exception and operate as a drinking place would put it in violation of the ordinance prohibiting smoking in workplaces. (R. pp. 66, 185-186) *See* City Code § 8-217. The ban prohibits smoking in public buildings, including bars and restaurants. An exception is made for smoking in retail tobacco stores.

could be attributed to retail sales of tobacco only whereas approximately 58% of the floor space constituted areas where alcohol could be consumed. (R. pp. 54, 193) The Zoning staff provided photographs of the full bar and also provided a floor plan showing the areas separated for drinking and for retail tobacco sales. (R. pp. 54, 75-85) The blue areas depicted on the floor plan show areas available for drinking. (R. p. 54) The floor plan also shows the location and setup of the bar and seating for the bar containing at least 19 chairs. (R. p. 54)

The owner provided sales figures suggesting that approximately 10% of sales came from alcohol with the other 90% coming from tobacco products. However, Tobacco Merchant admitted that sales figures and customer usage would change depending on the time of day. The owner acknowledged that during the daylight hours the business use was predominantly tobacco sales but as the evening progressed alcohol sales would increase. (R. p. 194) In the ensuing discussion about the use of the business the owner acknowledged that a person could enter the establishment to drink and not smoke. A patron would not be required to purchase tobacco in order to purchase a drink. The owner also acknowledged that nothing would prohibit a patron from bringing his own cigarettes and ordering drinks at the bar. (R. p. 195)

At the two hearings, the issue was framed as whether the sale of alcohol at the establishment was an accessory use. The Zoning Administrator took the position that the sale of alcohol failed the definition of accessory use found in the Zoning Ordinance. Tobacco Merchant argued that the sale of alcohol was an accessory or incidental use and that the retail sale of tobacco was the principal use of the location. (R. p. 194).

At the conclusion of the second hearing, the Zoning Board entertained a motion to reverse the Zoning Administrator's decision and find that the on-site sale and consumption of alcohol was an accessory use. This motion failed upon a 3-3 vote. An alternative motion was

made to uphold the Zoning Administrator's decision. This motion also failed upon a 3-3 vote. Therefore, pursuant to the Zoning Board's written regulations, the Zoning Administrator's decision classifying the business use of the Petitioner's property as a drinking establishment was upheld. (R. pp. 31-33, 52, 196).

## ARGUMENT

“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.” S.C. Code Ann. § 6-29-840 (Supp. 2012). “Courts are bound to afford substantial deference to the decision of those charged with interpreting and applying local zoning ordinances.” *Clear Channel Outdoor v. City of Myrtle Beach*, 372 S.C. 230, 234, 642 S.E.2d 565, 567 (S.C. 2007). A court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision. *Id.*

**I. The circuit court correctly held that the Zoning Board’s tie votes, which had the effect of upholding the Zoning Administrator’s decision, did not violate Tobacco Merchant’s due process rights.**

As described in the Statement of Facts, at the conclusion of the February 9, 2010, hearing, the Zoning Board entertained two alternative motions concerning the Zoning Administrator’s determination that the Tobacco Merchant was operating as a drinking place without a special exception. The first motion sought to overturn the Zoning Administrator’s decision. The second motion sought to affirm the Zoning Administrator’s decision. Each motion resulted in a tie vote by the count of 3-3. Therefore, in the event of a tie vote, pursuant to the Zoning Board’s procedural rules, it will be determined that the issue did not receive the requested relief from the Zoning Board and the appeal will be denied. (R. pp. 31-33, 52, 196). Tobacco Merchant argues that this procedure is illegal and violates its right to due process.<sup>2</sup>

The court of appeals found that the ruling on this issue was unchallenged by Tobacco Merchant and required affirmance under the two issue rule. Tobacco Merchant does not challenge these holdings by the court of appeals. The court of appeals was correct that this issue is not preserved for review. Tobacco Merchant did not object to the tie votes, or to the Zoning

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<sup>2</sup> There is no dispute here concerning whether the Zoning Board had the authority to promulgate its own rules of procedure. There is also no dispute concerning the substance of the procedural rule at issue.

Board conducting business with six members. It was incumbent upon Tobacco Merchant to timely object to the procedures employed by the Zoning Board and to the result of the tie votes. Its failure to do so is fatal to a review of the issue. In order to preserve an issue for review, the issue must be raised to and ruled upon by the lower tribunal. *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998). Moreover, Tobacco Merchant did not request a rehearing.

In any event, the Zoning Board's tie votes did not deprive Tobacco Merchant of due process. The Zoning Board may conduct business if a quorum is present. City Code, § 17-111 (R. pp. 244-245) There is no dispute that a quorum existed to conduct business and to hear Tobacco Merchant's appeal. The Zoning Board is specifically authorized to establish rules of procedure. *See* S.C. Code Ann. § 6-29-800(B) (Supp. 2012 (acknowledging a zoning board's use of its own rules to determine appeals); City Code, § 17-111(b)(1) (authorizing the Zoning Board to establish rules of procedure). (R. p. 245) The Zoning Board has enacted a rule of procedure to govern the situation where a quorum is present to conduct business but where the quorum could result in tie votes. In such a situation, if no affirmative action is taken by the Zoning Board on alternative motions, it will be determined that the appeal did not receive the requested relief, and its effect is to deny the appeal. (R. p. 52). See 59 Am. Jur. 2d *Parliamentary Law* § 17 ("Under common law or parliamentary law, an affirmative resolution or action that is the subject of a tie vote fails of adoption.").

Tobacco Merchant does not cite any authority to support its argument that the Zoning Board's procedure violates due process. Instead, Tobacco Merchant references general statements of the law prohibiting individual members from exercising a board's powers and duties. It is clear, however, that the Zoning Board's duties were not carried out by individual members in this instance.

The Zoning Board had the required quorum of its members present in order to conduct business in the instant case. City Code §17-111. Neither of the Zoning Board's two alternative motions to affirm or reverse the Zoning Administrator's decision garnered a majority vote, so by operation of the procedural rule, Tobacco Merchant's appeal was denied. Tobacco Merchant received all of the due process to which it was entitled.

**II. The court of appeals correctly determined that the Zoning Board's final decision was procedurally and substantively sufficient.**

Tobacco Merchant argues that the court of appeals should have reversed the decision by the circuit court because the Zoning Board's final decision was not in the proper format because it did not make findings of fact or conclusions of law. However,

[i]t is well settled that courts reviewing the decisions of zoning boards . . . may look to written documents as well as records of proceedings as sufficient formats for final decisions. For example, in *Vulcan Materials Co. v. Greenville County Board of Zoning Appeals*, 342 S.C. 480, 536 S.E.2d 892 (Ct. App. 2000), this court upheld a circuit court finding that a transcript of a zoning board hearing constituted a sufficient final written decision. On the question of whether the transcript alone could satisfy the statutory requirement of a written decision, 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.”

*Austin v. Bd. of Zoning Appeals*, 362 S.C. 29, 34-5, 606 S.E.2d 209, 212 (Ct. App. 2004 (internal citation omitted). In fact, “[t]he minutes normally constitute the BZA's final findings.”

*Wyndham Enterprises, LLC v. City of North Augusta*, 401 S.C. 144, 149, 735 S.E.2d 659, 662 (Ct. App. 2012).

As in *Austin*, the evidence considered by the Zoning Board in this case is “clearly laid out in the transcript of the hearing” and in the written materials submitted to the Zoning Board and made part of the record. *Austin*, 362 S.C. at 35, 606 S.E.2d at 212. The written materials, taken

together with the record of the public hearing, including the minutes, “provides sufficient basis for a reviewing court to determine whether the decision was supported by the facts of the case.”

*Id.* For example, in addition to the minutes and the video of the proceedings, the Zoning Administrator set forth detailed written evidence concerning its basis for concluding that the classification of the business as a drinking place did not constitute an accessory use. (R. pp. 56-59, 125-126).

In this case, the Zoning Board upheld the Zoning Administrator’s decision based “upon the application, submitted documents, and testimony considered by the Board of Zoning Appeals at the January [12, 2010] and February 9, 2010 public hearing . . . .” (R. p. 52). The facts upon which the Zoning Board based its decision are adequately set forth in the record presented to the circuit court. Therefore, the court of appeals correctly found that the Zoning Board’s final decision was sufficient.

**III. The court of appeals correctly found that the City would not be estopped from requiring Tobacco Merchant to obtain a special exception to operate a drinking place.**

Tobacco Merchant, in one paragraph without any citation of authority or citation to the record, argues that the court of appeals erred by ruling that the City should not be estopped from enforcing zoning ordinances regarding drinking places because “the city approved the original **business license.**” Petition at 9 (emphasis added). An approval of a business license does not estop the Zoning Division from applying the zoning ordinance.

Tobacco Merchant argues that it sought approval from the City Business License Division and the Zoning Division to sell tobacco products and the incidental sale of beer and wine. Tobacco Merchant claims that the City “approved the Tobacco Merchant’s license as a Cigar Lounge.” This is incorrect and there is no evidence in the record to support this statement.

Apparently, the Business License Division listed the type of business as a “Cigar Bar/Shop.”<sup>3</sup> (R. p. 165) However, there is no evidence in the record that the Business License Division approved the sale of alcohol. There is also no evidence that the classification of the business by the Business License Division was an approval to sell alcohol or that any such approval was recognized by the Zoning Division. The Zoning Division described the use of the property as a “cigar store/stand” on the City forms. (R. pp. 56, 165) The Zoning Division issued a Zoning Permit with a description of the business as a “Tobacco stand.” (R. p. 193) There is no evidence in the record that the Zoning Division knew of intended retail sales of alcohol or that it approved retail sales of alcohol. The Business License Division’s classification of this business is not relevant to the Zoning Division’s enforcement of zoning ordinances in this matter.

“As a general rule, estoppel does not lie against the government to prevent the due exercise of its police power or to thwart the application of public policy.” *Greenville County v. Kenwood Enters., Inc.*, 353 S.C. 157, 171, 577 S.E.2d 428, 435 (2003), *overruled on other grounds by Byrd v. City of Hartsville*, 365 S.C. 650, 620 S.E.2d 76 (2005). 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. *Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 692 S.E.2d 499 (2010). However, “[n]o estoppel can grow out of dealings with public officers of limited authority, and the doctrine of equitable estoppel cannot ordinarily be invoked to defeat a municipality in the prosecution of its public affairs because of an error or mistake of . . . one of its officers or agents . . . .” *DeStefano v. City of Charleston*, 304 S.C. 250, 257-8, 403 S.E.2d 648, 653 (1991).

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<sup>3</sup> There is no evidence in the record of what is meant by either “Cigar Lounge” or “Cigar Bar/Shop.”

Tobacco Merchant alleges that because it was “approved” by the Business License Division to sell alcohol, the Zoning Division could not prevent it from doing so. However, the Zoning Division is a separate division of City government and cannot be bound by a decision of a different licensing division.

Although the general aim of both zoning and licensing regulations is the promotion of the general welfare, each is independent of the other and seeks to accomplish its purpose by a different means. The fact that a zoning ordinance permits a use in a particular district does not authorize the use there without a license. On the other hand, a license or permit does not authorize a use in violation of zoning laws. In other words, a license or permit does not relieve one from complying with a zoning ordinance, and this generally is true of a state license or permit.

8 McQuillin Mun. Corp. § 25:14 at 62-3 (3d ed. 2010).

In *Quail Hill*, the Court held that a landowner receiving erroneous zoning information from an unauthorized employee was not sufficient to estop the County from enforcing a zoning classification preventing a landowner from developing his property. In that case, the landowner consulted a county subdivision coordinator and the county tax assessor to determine if the zoning classification for his property would allow him to develop a neighborhood of manufactured homes. The county subdivision coordinator and tax assessor erroneously advised the landowner that he could do so. Based on the fact that the subdivision coordinator and tax assessor were not employees of the zoning division and that the Zoning Administrator was the only county employee authorized to interpret or alter zoning classifications, the Court determined the landowner was given erroneous information by unauthorized individuals and could not rely upon that information to estop the county. *Quail Hill* at 237.

In the present case, Tobacco Merchant makes a similar argument – that the Zoning Division should be estopped from enforcing the C-3 zoning classification restrictions because a

different division – business licensing - may have approved the sale of alcohol. *Quail Hill* makes it clear that a party cannot justifiably rely on assertions from unauthorized employees. There is no evidence that Business License Division employees are authorized to speak on behalf of the Zoning Division. Therefore, the Respondents cannot be estopped from enforcing zoning classifications based on any representations or licenses issued by the Business License Division.

The Court in *Quail Hill* also denied estoppel to the landowner because the landowner had the means of knowledge as to the true zoning classification of his property. *Id.* Similarly, Tobacco Merchant did not lack knowledge of the Zoning Division’s classification of the use of its business. The Zoning Permit clearly stated that the business was classified as a “Tobacco stand.” (R. p. 93). Moreover, the Business License Clearance Form indicates that the business was approved by the Zoning Division only as a “cigar store and stand.” (R. p. 69; DVD of Feb. 9, 2010, hearing at 39:53). Tobacco Merchant was not justified in relying upon the Zoning Permit or the Business License Clearance form to think it would be able to install a bar and begin serving alcohol for on-premises consumption.

Accordingly, the court of appeals correctly held that the circuit court’s decision that the Respondents should not be estopped from enforcing its zoning restrictions against Tobacco Merchant should be affirmed.

**IV. The court of appeals correctly determined that Tobacco Merchant’s beer and wine sales did not constitute an accessory use.**

Tobacco Merchant continues to argue in its petition that it should not be deemed a drinking place because it has “incidental sales of alcohol pursuant to the City of Columbia ordinance on smoking.” Petition at p. 12 (emphasis added). Tobacco Merchant misapprehends the relevant issue in this matter. This case is **not** about the smoking ordinance; this is a zoning

dispute. The question is **not** whether alcohol sales are “incidental” pursuant to the smoking ordinance, but whether the use of the business as a drinking place is an accessory use to its operation as a tobacco store. Tobacco Merchant provides no argument in its petition that the sale of alcohol is an accessory use. Therefore, the court of appeals correctly found that the record supports the circuit court’s decision that the Tobacco Merchant is a drinking place and that the sale of alcohol did not constitute an accessory use under the City of Columbia zoning ordinances.

A “drinking place” is defined as an “establishment engaged in the retail sale of drink, such as beer, ale or wine for consumption on the premises.” City Code, § 17-55. (R. p. 230) With this definition in mind, it is undisputed that Tobacco Merchant is operating as a “drinking place”. The issue is whether this use is merely an accessory use. Depending on the answer to this question, Tobacco Merchant can either continue serving alcohol without a special exception, or Tobacco Merchant will be required to obtain a special exception from the Zoning Board to continue operating as a drinking place.

An “accessory 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.

City Code, § 17-55, Definitions (emphasis added). (R. p. 228) “An accessory use must be one ‘so necessary or commonly to be expected that it cannot be supposed that the ordinance was intended to prevent it.’” *Whaley v. Dorchester County Zoning Bd. of Appeals*, 337 S.C. 568, 579,

524 S.E.2d 404, 410 (1999). An accessory use is one that is dependent upon or pertains to the principal use and is considered an integral part of the primary use. 8 McQuillin Mun. Corp. §25:151 at 640-1 (3d ed. 2010). Accessory uses are those which are customarily incident to the principal use.” *Whaley*, 337 S.C. at 579, 524 S.E.2d at 410.

Based upon its view of the facts, the Zoning Board upheld the Zoning Administrator’s determination that Tobacco Merchant was operating as a drinking place in violation of its zoning classification and that the sale of alcohol for on-premises consumption did not constitute an accessory use to a tobacco shop. In its order, the circuit court ruled that the facts presented to the Zoning Board “demonstrate that the sale of alcohol is not subordinate to the sale of tobacco” and that “the sale of alcohol is not designed for the comfort, convenience or necessity of the occupants. Rather, the sale of alcohol was designed and intended to bring in outside persons for a drink. The sale and consumption of alcohol at a tobacco retail store is a luxury, not a necessity.” (R. p. 9)

The following facts are contained in the record and reasonably support the decision that the Tobacco Merchant’s sale of alcohol did not constitute an accessory use:

- area - only 27% of the business was devoted exclusively to tobacco sales, whereas beer and wine could be consumed in approximately 58% of the area (R. pp. 54, 193);
- the size of the bar area and the number of seats allocated to the bar area (19 seats) (R. p. 54);
- the business advertised the sale of beer on a store-front sign (R. p. 77);
- the business does not require a customer to purchase tobacco in order to purchase alcohol (R. p. 195);

- the business does not restrict the use of tobacco products to those purchased in-house (R. p. 195);
- the sales figures may not accurately describe the character of the business at different times of the day (R. pp. 187, 189);
- the nature of the business changes from day to night (R. pp. 43, 189);
- the sale of tobacco started before the business installed a bar and began serving alcohol (R. pp. 187-188); and
- the bar was installed without obtaining a building permit (R. p. 125).

These facts demonstrate that the circuit court was correct in affirming that Tobacco Merchant's sale of alcohol did not meet the definition for an accessory use. The sale of alcohol for on-premises consumption is not dependent upon the sale of tobacco, nor is it an integral part of the sale of tobacco. Clearly, the ability to buy and consume alcohol in the store is not subordinate to and does not serve the sale of tobacco where the purchase of tobacco is not required in order to consume alcohol in the store. The sale of alcohol can stand on its own. This is evident from the amount of space devoted to alcohol sales and use and the fact that a bar area exists with numerous seats available for patrons to enjoy drinks. (R. pp. 54, 56-58, 75-85)

The court of appeals correctly found, based on its standard of review, that the Zoning Board's decision was supported by evidence in the record.

**V. The circuit court correctly held that the Zoning Board's decision to classify Tobacco Merchant as a drinking place did not violate Tobacco Merchant's equal protection and due process rights.<sup>4</sup>**

Tobacco Merchant argues that it has been treated "differently than other similarly situated businesses" such that the Respondents are violating Tobacco Merchant's equal protection rights.

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<sup>4</sup> This issue was found by the court of appeals to have been unchallenged and abandoned by Tobacco Merchant. Tobacco Merchant does not challenge this holding by the court of appeals.

However, as correctly found by the circuit court, Tobacco Merchant fails to establish an equal protection violation.

Tobacco Merchant makes no attempt to explain that it is a member of a class or that any classification was not reasonably related to a legitimate government interest. *See State v. White*, 348 S.C. 532, 560 S.E.2d 420 (2002) (holding the challenging party has the initial burden “to show that the ordinance is arbitrary and has no reasonable relation to a lawful purpose”). In support of its argument, Tobacco Merchant simply asserts that its business was treated differently than other similarly situated business and vaguely refers to “other similarly situated businesses.” Tobacco Merchant does not explain how the other vaguely-referenced businesses are similarly-situated to the Tobacco Merchant. Nor does Tobacco Merchant explain how the City has treated the alleged similarly-situated businesses. To do so now would be speculative. Tobacco Merchant did not provide a record for any body or court to make any determination whether any of the other vaguely-referenced businesses are truly similarly-situated or whether the City has treated them differently. Specifically, there is no evidence in the record of a retail tobacco store located in a C-3 zoning district, like Tobacco Merchant, that installed a bar, bar stools, coolers, and TVs, and attempted to conduct retail sales of alcohol for on-premises consumption.

“To prove that a statute has been administered or enforced discriminatorily, more must be shown than the fact that a benefit was denied to one person while conferred on another. A violation is established only if the plaintiff can prove that the state *intended* to discriminate.” *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 819 (4th Cir. 1995) Tobacco Merchant fails to argue or establish facts that the City denied a benefit to Tobacco Merchant that it conferred on others or that it intended to discriminate against Tobacco Merchant by denying its appeal.

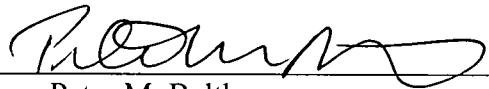
Tobacco Merchant appears to mischaracterize the issue of code enforcement with one of equal protection. The simple fact that the Respondents have enforced zoning ordinances against Tobacco Merchant does not establish a claim for a violation of equal protection. The record shows that the Zoning Division received a complaint and performed an investigation. (R. pp. 56-57). There is no evidence the Zoning Division arbitrarily decided to inspect and cite Tobacco Merchant for a violation of the zoning ordinance.

Finally, the City has not violated Tobacco Merchant's due process rights. The fact that zoning ordinances may create some situations where Tobacco Merchant does not have unlimited free use of its property does not automatically equate to constitutional infirmity. *See Bear Enters. v. County of Greenville*, 319 S.C. 137, 141, 459 S.E.2d 883, 886 (Ct. App. 1995 (“A legislative body does not deny due process simply because it does not permit a landowner to make the most beneficial use of its property.”)). Tobacco Merchant has not been deprived of its property or precluded from obtaining beneficial use of the property. There is no dispute that the business may lawfully operate as a retail tobacco store, as it has done since 1997. (R. p. 23)

## CONCLUSION

For the reasons stated above, this Court should deny Tobacco Merchant's Petition for a Writ of Certiorari. The Zoning Board's decision was in all respects proper under state and municipal law. The Zoning Board correctly determined that Tobacco Merchant's sale of alcohol in a C-3 zoning district was not an accessory use and required a special exception.

Respectfully submitted,

By: 

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Attorney for Respondents

November 14, 2014  
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

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Case No. 2014-002195

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Tobacco Merchant ..... Petitioner,

v.

City of Columbia Zoning Administrator,  
Board of Zoning Appeals, and City of Columbia ..... Respondents.

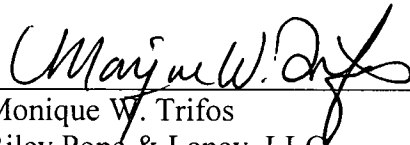
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**PROOF OF SERVICE**

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I certify that I, Monique W. Trifos, an employee with Riley Pope & Laney, LLC, have served the Respondents' Return to Petition for Writ of Certiorari by depositing a copy of the same in the United States Mail, postage prepaid, on November 11, 2014, at the address below:

Darryl D. Smalls, Esquire  
PO Box 212724  
Columbia, SC 29221

  
\_\_\_\_\_  
Monique W. Trifos  
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November 14, 2014

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November 14, 2014

**HAND DELIVERED**

**RECEIVED**

NOV 14 2014

**S.C. Supreme Court**

The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Supreme Court Building  
1231 Gervais Street  
Columbia, South Carolina 29201

Re: Tobacco Merchant v. City of Columbia Zoning Administrator, Board of Zoning Appeals, and City of Columbia  
Appellate Case No.: 2014-002195  
My File No.: 5253.00814

Dear Mr. Shearouse:

Please find enclosed for filing one (1) original unbound and seven (7) stapled copies of the Respondent's Return to Petition for Writ of Certiorari with Certificate of Service. Please file same and return the clocked copy with my courier.

If you have any questions, please let me know.

Sincerely,



Peter M. Balthazor  
Attorney for Respondent

PMB/mwt

Enclosures

cc: Darryl D. Smalls, Esquire (w/enclosures)