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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

C/A No. 2013-CP-40-4051

Case No. 2014-001824

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

v.

City of Columbia Board of Zoning Appeals.. Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Did the circuit court correctly find that the Board of Zoning Appeals did not err in denying Petitioner's request for a special exception to operate a liquor store?

2. Did the circuit court correctly find that Appellant was not prejudiced by a conflict of interest where the City of Columbia hired private counsel to appear at the Board of Zoning Appeals hearing?

STATEMENT OF THE CASE

This is a zoning case. Appellant sought to operate a liquor store in a C-3 zoning district. Use of the subject property as a liquor store was not allowed as a matter of right. In order to operate the liquor store, Appellant was required to obtain a special exception from the Board of Zoning Appeals (hereinafter the "Board" or "Respondent"). After a hearing, the Board denied the request. The main issue in this case is whether the Board properly denied Appellant's request for a special exception to operate a liquor store.

Appellant received a business license to operate a convenience store on September 12, 2012. After receiving the business license Appellant constructed a non-permitted wall to separate a liquor store business from the convenience store business in the same building. (R. p. 83). The liquor store began operation prior to obtaining a special exception for its operation. (R. pp. 103, 114). Appellant applied for a special exception on May 14, 2013. (R. 87-8)

Appellant's liquor store is located in a C-3 zoning district. (R. pp. 83, 87) Liquor stores may be operated only pursuant to a special exception in C-3 zoning districts. (R. p. 83) City Code § 17-258.

A public hearing was held on the application for a special exception on June 11, 2013. (R. pp. 99, 103-105) There were no objections to any of the presentations or arguments made to the Board. The applicant presented evidence in support of his application. In addition, at least five community residents spoke in opposition to the special exception.[1] A private attorney also spoke in opposition to the special exception.

[1] The entire Board hearing is part of the record in the form of a DVD of the proceedings, and an informal transcript typed by the undersigned counsel's legal assistant. (R. pp. 114-126) (The Board hearing starts at the 1:47:45 marker of the DVD.) In addition, the

One of the residents who spoke, Mr. Rhodes, lived in the neighborhood directly behind the proposed liquor store, and indicated that the area did not need another liquor store. (R.pp. 115-116; BOZA Hearing Video of June 11, 2013, at 1:57:11) Mr. Rhodes also testified to the proximity of the liquor store to Eau Claire High School and a middle school. (Id.) He testified that there were a lot of kids in the neighborhood that walked to school and that they would walk right in front of the liquor store. (Id.)

Patricia Brown, president of the Northwood Hills Neighborhood Association, also spoke in opposition to the special exception. (R. pp. 120-121; BOZA Hearing Video of June 11, 2013, at 2:20:09) In addition to Mr. Rhodes, she also spoke about pedestrian traffic and that people would not be comfortable walking in an area with possible loiterers. She testified to the proliferation of liquor stores in the area. She indicated that the community needed to be revitalized and that adding another liquor store would not encourage families to move to the area. In addition, she spoke about the health of the community, and that a liquor store would not promote or contribute to the physical health of the neighborhood.

Next, Pearl Allen testified. (R. p. 121; BOZA Hearing Video of June 11, 2013, at 2:24:54) Ms. Allen stated she was a resident of the Northwood Hills neighborhood and she had concerns over the proximity of the liquor store to the middle school and to another long-existing liquor store. She also testified that children walked from school in the area.

In addition, Christy Savage testified. (R. pp. 121-122; BOZA Hearing Video of June 11, 2013, at 2:29:30) Ms. Savage was the president of the Eau Claire Community

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minutes of the Board proceedings are part of the record before this Court. (R. pp. 103-105)

Council, and immediate past president of the Northwood Hills Neighborhood Association. She testified about the proximity of the proposed liquor store to the other liquor store, and to the middle school. (Id.) She presented a photograph to the Board showing the posters, signage, and red dots on the proposed liquor store. (R. p. 69). She also spoke about the health issues facing the community, and that another liquor store would not enhance the health of the community. (R. pp. 121-122)

Finally, Inspector Hartley of the Columbia Police Department testified. (R. pp. 122-124; BOZA Hearing Video of June 11, 2013, at 2:35:45) Inspector Hartley showed that, including Appellant's liquor store, there were four liquor stores within a one mile radius of the middle school. (R. pp. 74-5, 122-23; BOZA Hearing Video of June 11, 2013, at 2:35:45) Inspector Hartley testified that Appellant's liquor store was approximately 695 feet to the closest point of entrance of the school grounds. (R. p. 76)

At the conclusion of the hearing, a Board member made a motion to deny the request for a special exception. The motion passed 4-2 and the Board issued its written order on June 27, 2013. (R. pp. 64-5, 105) The Board's written order stated, in part, that the special exception was being denied because it would "adversely affect the public interest due to the proximity to a middle school and the proliferation of liquor stores in the area" and that the proposed use would "impact the aesthetic character of the environs, especially in regards to the proliferation of signs" on the business. (R. p. 65)

Appellant timely filed his appeal from the Board's order, and on March 7, 2014 a hearing was held in the Richland County Court of Common Pleas. (R. pp. 40-62) Following the hearing, the trial court stated its decision in favor of Respondent, and requested a proposed order from Respondent's counsel. The trial court accepted

Respondent's proposed order and adopted it *in toto*. The trial court's order was filed on June 4, 2014, and Appellant timely filed a notice of appeal with this Court. (R. pp. 3-11, 38)

Respondent objects to certain portions of Petitioner's Statement of the Case.[2] The first paragraph of Petitioner's statement is argumentative and contains a restatement of the issues on appeal. Respondent also takes exception to Appellant's statement that Appellant never received notice or had knowledge that private counsel would appear and argue against the granting of the special exception. (Appellant's Initial Br. at p. 2). This statement is also argumentative, and is not relevant to this appeal. For public hearings such as the one held in this matter, there is no requirement that parties be provided notice of opposition. In practice, a zoning board and zoning staff are unlikely to know who might appear at a hearing for or against a particular issue.

ARGUMENT

In zoning cases, a reviewing court's standard of review is governed by S.C. Code Ann. § 6-29-840(A) (Supp. 2014). 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

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[2] See Rule 208(b)(2), SCACR (stating a respondent need not include a statement of the case unless dissatisfied with the statement of the case by the appellant, and that respondent shall be bound by the appellant's statement unless respondent includes his own statement).

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. 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).

1. The circuit court correctly found that the Board's decision to deny the special exception to operate a liquor store was supported by evidence in the record and the decision was not 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. 2014). Pursuant to this statute, the City of Columbia Zoning Ordinance ("City Code") contains substantive provisions, i.e., terms and conditions, relating to the grant or denial of a special exception.[3] See City Code § 17-112(2). One of these provisions, section 17-112(2)b.4., states that the Board "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

[3] At the circuit court hearing, Respondent entered into the record, without objection, certified copies of applicable City Code sections. (R. pp. 41, 127-137).

public interest." Pursuant to the City Code, the Board must address the public interest of the proposed use. Therefore, if the Board is unable to make this specific finding regarding public interest the special exception must be denied.

The City Code also contains specific criteria for special exceptions in section 17-112(2)c. This section states that the Board "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." City Code § 17-112(2)c. Section 17-112(2)a.1., also places a duty on the Board to "[d]eny special exceptions when not in harmony with the intent and purpose of this article."

The Board evaluated the special exception request in this case under each of the above substantive rules governing special exceptions and denied the application for a special exception. (R. pp. 64-5) The Board, pursuant to section 17-112(2)b.4., found that granting 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." (R. p. 65).

A liquor store is not a use by right in the applicable zoning district. By requiring a special exception for such a use, City Council has clearly said that the use must be in the public interest, and that the Board should deny the request if the use would be adverse to the public interest. <u>See</u> City Code § 17-112(2)b.4 (stating that the Board must find that a special exception "will not adversely affect the public interest.").

There is evidence in the record to support the Board's determination that the public interest would be adversely affected. First, the Board heard evidence and

considered the liquor store's location and proximity to schools and children. The Board found that if the special exception was granted it "would adversely affect the public interest due to the proximity to a middle school." (R. p. 65). Others may disagree with the conclusion reached by the Board, but the facts underlying the Board's decision are undisputed and concrete. 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. (R. pp. 67-8, 70, 72, 84-5, 116-7) The Board heard testimony that kids from the neighborhood walk to school and will walk right past the liquor store. (R. p. 116) The proximity of a liquor store to schools, children and neighborhoods is certainly a valid consideration in determining whether a use is appropriate for a particular location, and whether that use would adversely affect the public interest.

Next, the Board heard evidence and considered the number of liquor stores in the area in its evaluation of public interest. The Board found that if the special exception was granted it "would adversely affect the public interest due to the . . . proliferation of liquor stores in the area." (R. p. 65). The number of liquor stores in a particular area is also a real and valid concern in the zoning context. There is no reason that a zoning board cannot consider the number of a particular type of use in its evaluation to determine whether the granting of a special exception will adversely affect the public interest. The Board heard evidence of the number of liquor stores in the area and decided that such number would adversely affect the public interest. The evidence presented at the hearing showed that another liquor store was already located on the same side of the road and within view of the Appellant's store. (R. pp. 67-8). In addition to that store, at least two other liquor stores are located within one mile of the middle school. (R. pp. 73-5) 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.

In addition to the physical evidence of the number and location of existing and proposed liquor stores, the Board also heard testimony from a neighborhood association president and a nearby neighborhood resident concerning the concentration and proliferation of liquor stores. (R. pp. 115-6, 120-1; BOZA Hearing Video of June 11, 2013, at 1:57:11 [David Rhodes] and at 2:20:09 [Patricia Brown]). One witness stated that the area had plenty of liquor stores and another liquor store would not help family-oriented investment in the area. (R. p. 116). 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. (R. pp. 115-6) This testimony supplements and enhances the other testimony heard by the Board concerning the concentration of liquor stores in the area, and this testimony demonstrates the purpose of zoning ordinances and special exceptions.

The purpose of a zoning ordinance is to guide development "in accordance with existing and future needs and [to] promot[e] the public health, safety, morals, convenience, order, appearance, prosperity, and general welfare." S.C. Code Ann. § 6-29-710(A) (2004). To this end, zoning ordinances should "facilitate the creation of a convenient, attractive, and harmonious community . . . [and] regulate the **density and distribution** of . . . the uses of buildings, structures and land for trade, industry . . . ." S.C. Code Ann. § 6-29-710(A)(3) and (4) (2004) (emphasis added). The City Code has attempted to do this by allowing for liquor stores only by special exception in certain zoning districts. See City Code § 17-258, Table of Permitted Uses. At some point, if the facts support the decision, as in this matter, the Board can say "enough is enough" by

denying a special exception that would not be in the public interest. That is exactly what the Board did in this case when it relied on concrete, competent facts concerning proximity and proliferation to conclude that the special exception would not be in the public interest. It is entirely permissible for the Board to take into account the problem of cumulative impact of such use, and to make a decision to regulate the density and distribution of such use. Testimony heard by the Board regarding the cumulative impact showed that the cumulative impact would not promote a family-oriented community, and would not enhance the health and livability of the community. (R. pp. 120-22; BOZA Hearing Video of June 11, 2013, at 2:20:09, and 2:29:30) Appellant has not cited any authority 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.

The testimony concerning the proximity of the proposed liquor store to a school and the number of liquor stores in the area is not speculation or conjecture. The Board 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. Appellant seeks to have this Court take a different view of the evidence and make a different decision than that reached by the Board. However, a reversal of the Board's determination that the special exception would adversely affect the public interest would be substituting this Court's judgment for that of the Board. 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). It is certainly acknowledged that others viewing the same facts may come to a

different conclusion than that reached by the Board. For instance, a different board, just like a different jury, may have viewed the facts differently and applied the facts differently. But, this Board took the facts concerning proximity to a school and the proliferation of liquor stores and applied those facts to the concept of public interest, which it was required to do pursuant to the City Code. Based on the record, evidence was presented by which the Board could reasonably conclude that the special exception would adversely affect the public interest.

Appellant cites to Bannum v. City of Columbia, 335 S.C. 202, 516 S.E.2d 439 (1999) for the proposition that the Board's decision was arbitrary. As Appellant correctly points out, the Supreme Court determined there was no "concrete evidence" to support the neighboring residents' view that the halfway house would increase traffic. Id. at 206, 516 S.E.2d at 441 (stating that the residents "felt" the halfway house would increase traffic). However, contrary to Appellant's view, in the present case, the Board relied on concrete evidence that the liquor store was in close proximity to a school, and that the liquor store would have been the fourth one in a one-mile radius of the school. The Board applied these concrete facts to determine that the special exception would adversely affect the public interest.

Appellant also 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 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." Id. at 150, 735 S.E.2d at 662. Therefore, the court of appeals reversed the board's decision, finding the decision was arbitrary and capricious.

The present case is readily 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. In Wyndham, this Court 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 (emphasis added). In the present case, the Board was required to make a determination regarding the public interest. The testimony relied upon by the Board was not based on speculation or opinion and there should be no concern about the basis of the testimony provided to the Board concerning proximity or concentration. The Board 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 the Board's determination regarding the public interest was not based upon speculation or conjecture.

Appellant seems to argue, pursuant to Wyndham, that that the Board could not deny the special exception request without hearing evidence from residents concerning

specific injuries to property or competent testimony on how the liquor store would negatively impact the value of residents' property.[4] (Appellant's Initial Brief at pp. 5, 11, 14). This type of testimony was not necessary for the Board to deny the special exception request in the present case. Wyndham does not stand for the proposition that this type of testimony is necessary in every case. Wyndham simply declares that if a zoning board is going to rely on such testimony that the testimony must be competent.

The City Code also contains other criteria for special exceptions in section 17-112(2)c. This section states that the Board "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 of the public interest, BOZA evaluated the special exception application in this case under each of the above substantive rules governing special exceptions and, under the fourth criteria, found that the special exception use would "impact the aesthetic character of the environs,

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[4] It is true that the Board's order made reference to a depreciation of property values in adjacent areas. (R. p. 65). However, this conclusion was made in relation to whether the special exception would be in harmony with the intent of a C-3 zoning district. See City Code § 17-112(2)a.1. (stating the Board must "[d]eny special exceptions when not in harmony with the intent and purpose of this article"). Regardless of whether this conclusion was substantiated by the evidence, it would not diminish the Board's separate conclusion, pursuant to City Code § 17-112(2)b.4., 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."

especially in regards to the proliferation of signs . . . ."[5] (R. p. 65) In this regard, one of the witnesses introduced a photograph depicting the signage and posters on the outside of the building. (R. pp. 69, 121-2 [Savage testimony]) One of the Board members commented that the signage on the outside of the building contained "9 red dots". (R. p. 122). When questioned about signage, Appellant admitted that he had advertisements for liquor, cigarettes, and the lottery.[6] (R. p. 125) The Board determined, in its judgment, that the signage and posters impacted the aesthetic character of the environs. These concerns about the impact of the aesthetic character certainly find support in the record. Ms. Brown testified about her concern with the signage and its visual effects on passersby, in addition to the photograph of the signage presented by Ms. Savage. (R. pp. 69, 120) This court cannot substitute its judgment for that of the Board where evidence is in the record supporting the Board's decision. Restaurant Row, supra.

Therefore, based on the reasons stated above, the Board did not act arbitrarily in denying the application for special exception, and the circuit court correctly found that the Board's decision was supported by evidence in the record.

2. **The circuit court correctly found that there was no conflict of interest created by City Council hiring outside counsel to appear on its behalf at the Board meeting, and by finding that there was no prejudice resulting to Appellant.**

[5] The Board 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. (R. p. 65)

[6] Appellant offered to remove any signage, but City staff indicated that sign regulations were tough to enforce because signage can be removed and reinstalled. (R. p. 118). The Board was not required to accept Appellant's offer to remove signage. The evidence presented to the Board showed that at the time of the hearing, the use of the building, as depicted in the photograph, would adversely impact the aesthetic character of the environs.

Appellant argues that a conflict of interest was created by the appearance at the Board hearing of a private attorney retained by City Council.[7]

In his brief, Appellant characterizes the conflict of interest as being between the Respondent, the City of Columbia, and private counsel. Respondent respectfully asserts that Appellant has mischaracterized and misunderstood the concept of a conflict of interest in this matter. First, Appellant argues there was a conflict because the "City of Columbia sought to unduly influence the Respondent when the City of Columbia's sole 'function under this article shall not include hearing and deciding questions of interpretation and enforcement which may arise . . . . [quoting City Code § 17-81(b)]'" [App. Initial Br. at p. 19] This statement does not describe a conflict of interest between the Respondent, the City, and private counsel. As Appellant points out, Rule 1.7, RPC, Rule 407, SCACR, defines a concurrent conflict of interest. In simple terms, Rule 1.7 prohibits an attorney's representation of Client A if that representation would be directly adverse to Client B. Appellant does not explain how this rule applies to the Board, or how the Board created a conflict of interest. It is undisputed that the Board did not hire outside counsel, and that outside counsel was engaged by City Council. This is not a

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[7] Appellant recognizes that he did not raise the issue of a conflict of interest in the hearing before the Board. (Appellant's Initial Br. at p. 23). Had he done so, the Board may have had occasion to remedy the situation at that time. By not raising this issue at the earliest opportunity, Appellant has waived this issue for appellate review. See Burton v. County of Abbeville, 312 S.C. 359, 440 S.E.2d 396 (Ct. App. 1994) (stating an issue was not preserved for appeal where it was not addressed by the Board of Zoning Appeals); In re Michael H.,360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) ("In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court."); Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 510–11, 598 S.E.2d 712, 715 (2004) ("It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court.").

situation envisioned by Rule 1.7 where a lawyer represents two adverse clients. There is no evidence that outside counsel was engaged by, or was representing, the Board.

Next, Appellant argues that a conflict existed because the "City of Columbia sought to circumvent [City Code § 17-81(b)] by hiring private counsel to assert its interpretation and influence before the Respondent." [App. Initial Br. at p. 19] Again, this argument does not describe a conflict of interest. Appellant may be upset and may feel that City Council should not have hired private counsel to appear at the hearing in opposition to the application, but the facts in the record and Appellant's argument do not point to a conflict of interest.

Appellant also cites Rule 1.8(l), RPC, Rule 407, SCACR, as authority for the existence of a conflict of interest. However, Appellant does not explain how this rule applies in the context of these facts. Rule 1.8(l) states that, "In an adversarial proceeding, a lawyer shall not serve as both an advocate and an advisor to the hearing officer, trial judge or trier of fact." Id. "This rule prohibits a lawyer who has served or is serving as an advisor [to a public administrative body] on a particular matter from also prosecuting or defending that particular matter." Comment [19], Rule 1.8, RPC, Rule 407, SCACR. There are no facts in the record that outside counsel served as an advisor to the Board, while at the same time appearing at the hearing.

Appellant also suggests that the City Attorney's office had a conflict of interest and could not appear at the Board hearing. If Appellant is correct that the City Attorney's office had a conflict prohibiting it from appearing at the hearing, while at the

same time representing and advising the Board,[8] any conflict was certainly remedied by the City Council hiring outside counsel who, undisputedly, did not represent both the interests of the City Council and the interests of the Board.

It is apparent from Appellant's arguments that there would be no circumstance under which the City Council could appear through counsel at the Board hearing. Appellant says the City Attorney's office cannot appear on behalf of City Council, and also that private outside counsel cannot appear on behalf of City Council. Appellant couches his argument in terms of a conflict of interest, but it is clear that the situation encountered by Appellant at the hearing was not one where a conflict of interest existed.

Appellant does not cite any authority prohibiting a councilmember from appearing at a public hearing. Zoning board hearings are advertised by public notice and are open to the public. S.C. Code Ann. § 6-29-800(D) (Supp. 2014). Likewise, Appellant does not cite any authority prohibiting a municipal body from engaging outside counsel to appear on its behalf at a public hearing. In fact, 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 a zoning board to the circuit court. S.C. Code Ann. § 6-29-820 (A) (Supp. 2014). In other words, this statute allows a municipal body to take an adverse position to that of a zoning board. Ostensibly, this would be done by engaging an attorney employed directly by the local governing body, or by engaging outside counsel.

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[8] Respondent does not believe that a conflict of interest would have existed in this situation. See Comment [19], Rule 1.8, RPC, Rule 407, SCACR (stating the rule "does not prevent one lawyer from prosecuting an administrative matter in which another lawyer in the same office serves as an advisor to the hearing body, as long as the lawyers do not communicate with one another or share information about the particular case").

Appellant cites numerous City Code sections that spell out the responsibilities of the zoning administrator, City Council, and the City Attorney. The City Code sections cited by Appellant do not prevent the City Council from hiring outside counsel. Appellant argues that these code sections were violated because the City Council's responsibilities do not include "hearing and deciding questions of interpretation and enforcement." City Code § 17-81. There is no evidence in the record that the City Council, through outside counsel, was "deciding questions of interpretation and enforcement." City Code § 17-81.

For the first time, in this appeal, Appellant cites to section 8-13-740 of the South Carolina Code of Laws, as authority for the proposition that there existed a conflict of interest.[9] In order to attempt to fit outside counsel into the application of this statute, Appellant refers to outside counsel as a "public employee" and states that outside counsel "had an official responsibility to counsel both agencies as a public employee."[10] [Appellant's Initial Br. at pp. 20-21] Appellant also asserts that outside counsel "represented both parties at the hearing." These statements are unsubstantiated by the record. Outside counsel clearly indicated that he had been retained by City Council. [R. pp. 116, 118] There is no evidence that outside counsel represented the Board, or that outside counsel was a public employee simply because he was retained by City Council for the limited purpose of appearing at the Board hearing. Even assuming outside counsel could be considered a public employee, there is no evidence that outside counsel has official responsibility for the Board. See S.C. Code Ann. § 8-13-740(A)(5) and (6)

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[9] Section 8-13-740 was neither raised to nor ruled upon by the circuit court, and cannot be raised for the first time here on appeal.

[10] Prior to taking this position that outside counsel is a "public employee", in his brief Appellant repeatedly refers to outside counsel as "private counsel".

(Supp. 2014) (prohibiting a public employee from representing a person before an agency or entity for which the public employee has official responsibility).

What is also abundantly clear in this matter is that the Board had no part whatsoever in creating any perceived conflict of interest. The Board is the only respondent identified in this appeal. Given that the Board did not create any perceived conflict of interest, the Board's decision should not be reversed for actions over which it had no control.

Appellant also asserts that the alleged conflict of interest prejudiced him in this matter. Appellant apparently argues that the conflict of interest in turn created a situation of undue influence on the Board members. Appellant's argument of undue influence and prejudice does not stand alone – it is dependent first on a finding of a conflict of interest. Therefore, Respondent asserts that if there was no conflict of interest, then there would be no prejudice.

In any event, Appellant has not explained how he was prejudiced by a conflict of interest, other than being denied the special exception. Instead, Appellant seems to argue, in a conclusory fashion, that private counsel somehow unduly influenced the Board. There is no evidence, and Appellant has not pointed to any evidence, demonstrating that any board member voted a certain way because of the alleged conflict of interest. Appellant's examples of undue influence are nothing more than speculation and conjecture. For example, Appellant takes issue with the simple fact that the Board engaged in some colloquy with outside counsel.

Therefore, based on the arguments presented here, Respondent asserts that there was no conflict created by City Council hiring private counsel to appear at the Board

hearing. Further, Appellant was not prejudiced by an attorney appearing on behalf of City Council at the hearing.

CONCLUSION

For the reasons stated herein, the circuit court's decision to affirm the denial of the special exception should be affirmed.

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February 16, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

C/A No. 2013-CP-40-4051

Case No. 2014-001824

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

v.

City of Columbia Board of Zoning Appeals.. Respondent.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

February 16, 2015

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PROOF OF SERVICE

I certify that I have served the Brief of Respondent and this proof of service by depositing a copy of the same in the United States Mail, postage prepaid, on February 17, 2015 at the address below:

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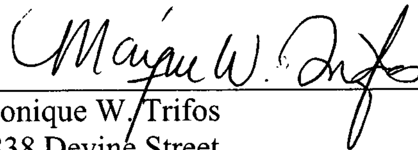

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