

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Case No.: 2013-CP-40-4051

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

v.

City of Columbia Board of Zoning Appeals,.....Respondent.

FINAL BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF THE ISSUES ON APPEAL

- I. Did the trial court error in affirming the Respondent's decision to deny the special exception to the Appellant when the Respondent's decision to deny the request for a special exception was arbitrary and capricious and where the Respondent did not adhere to its own criteria for granting special exceptions.
- II. Did the trial court error in determining that the Appellant was not prejudiced by a conflict of interest between the Respondent, City Council, and private counsel when City Council hired private counsel to argue before the Respondent which is an administrative agency of the City of Columbia.

STATEMENT OF THE CASE

The Respondent's denial of the Appellant's request for a special exception to open a liquor store was arbitrary and capricious; furthermore, the Respondent did not follow its own guidelines for granting special exceptions for liquor stores in C-3 districts. The City of Columbia unlawfully hired private counsel to argue interpretation and/or enforcement of laws on zoning board issues before the Respondent which is an agency of the City of Columbia. The City of Columbia hired private counsel to influence the Respondent's decision to deny the Appellant's request for a special exception only because the Appellant's business was a liquor store.

The Appellant filed a letter of agency and an application for a special exception for a liquor store located at 5050 Fairfield Road, Columbia, South Carolina on May 15, 2013. [R. pp. 087-088.] The application summary lists the case number as 13-041-SE and states that the building is located in a C-3 (General Commercial) zoning district. [R.

p. 083.] Notice of the Appellant's public hearing was posted on the property and published in a newspaper.

A hearing was held before the Respondent on June 11, 2013, to consider the Appellant's request for a special exception to operate a liquor store. The Respondent heard oral arguments from the parties against and in favor of granting the request for a special exception to operate a liquor store. [R. pp. 114 -126; BOZA Video filed separately.] The Respondent heard from Chaplin Spencer, private counsel hired by the City Council, and several other witnesses opposing the request for special exception. [R. p. 116, line 26 – p. 120, line 2.] The Appellant never received notice nor did the Appellant have any knowledge that Chaplin Spencer would appear on behalf of the City Council and argue against granting the special exception. At the conclusion of the hearing, the Appellant's request for a special exception was denied. [R. pp. 001-002; 064-065.]

By letter dated July 12, 2013 to the Circuit Court, the Appellant timely filed his appeal of the Respondent's Order with a case number of 2013-CP-40-4051. [R. p. 037.] The Respondent filed its' Return on August 22, 2013. [R. pp. 028-029.]

A hearing involving the Appellant and Respondent was held in a Richland County court on March 7, 2014, before the Honorable Eugene C. Griffith, Jr. The Appellant presented a brief and the Respondent provided the court with Memorandum of Law in Opposition to Petition for Appeal for the court's review. [R. pp. 014-027; 030-034.] In addition, counsel for the Appellant presented oral arguments to the court regarding the facts and law in favor of reversing the Respondent's decision and granting the special exception; counsel for the Respondent presented oral arguments in opposition to

affirming the Respondent's decision and denying the Appellant's special request. [R. pp. 040-062]. On June 4, 2014, the Circuit Court issued an Order affirming the Respondent's decision to deny the special exception to the Appellant. [R. pp. 003-011.]

The Appellant timely filed his Motion for Reconsideration on June 11, 2014. [R. pp. 035-036.] The Appellant's Motion for Reconsideration was denied by Order of July 30, 2014. [R. pp. 012-013.] The Appellant filed his Notice of Appeal on August 25, 2014. [R. pp. 038-039.]

STATEMENT OF THE FACTS

The Appellant opened Seven Days Food Mart LLC, a convenience store located at 5050 Fairfield Road, Columbia, South Carolina. The Appellant leases the building from the property owners Vicken and Zozete Baklayan. [R. p. 089.] The business license application for the convenience store was approved on September 21, 2012. Appellant applied for and received a license to sell beer, wine, and liquor on or about January 17, 2013 from the South Carolina Department of Revenue. [R. p. 113.] The liquor store encompassed 464 square feet in the 5950 square feet building located at 5050 Fairfield Road, Columbia, South Carolina. The Appellant contracted, at his own expense, to have a wall separating the convenience store area from the liquor store. The Appellant learned after he had invested large sums of money in the remodeling of the building and opening of the liquor store that a special exception was required to operate the liquor store in the C-3 district. [R. p. 114, line 10 – p. 115, line 3; BOZA Video filed separately.] The Appellant made application for a special exception to open the liquor store on or about May 15, 2013. [R. pp. 081-088.] C-3 districts are residential

areas within the city limits of Columbia which allow a variety of commercial and nonresidential uses within that area. [R. p. 130.]

Notice of the public hearing was posted on the property and was published in the newspaper no less than fifteen (15) days before the hearing. A public hearing was held on the matter of the special exception on June 11, 2013. [R. pp 103 – 105.] The Appellant testified in favor of granting the special exception for the liquor store and also testified that he would comply with any additional requirements made by the Respondent to secure the special exception. The Appellant further testified that he expended a large sum of money to improve and enhance the store in anticipation of obtaining the special exception to keep open the liquor store. In addition, one party spoke in favor of granting the special exception for the liquor store. [R. p. 114, line 1 – p. 115, line 33; p. 120, lines 4-21; p. 124, line 35 – p. 126, line 14; BOZA Video filed separately.]

The City of Columbia is a municipality in the State of South Carolina. City Council hired private counsel to influence the Respondent and to oppose granting the special exception. The Respondent is an administrative agency of the City of Columbia charged with the independent duties of granting special exceptions and hearing and deciding appeals when it is alleged that there is an error in law of a decision made by the zoning administrator in the enforcement of the provisions of the Zoning Ordinance. [R. pp. 127 – 129.] City Council has no power to conduct hearings or to decide questions of interpretation and enforcement arising out of board of zoning appeals; however, the City Council violated this city ordinance when it hired Chaplin Spencer, a

private attorney, to argue interpretation of the special exceptions in the Appellant's case before the Respondent. *Sec. 17-81 of the City of Columbia Code of Ordinances.*

The city attorney is the chief legal counsel to the City of Columbia, to the mayor, to city council, to the city manager, and to all other officers and department heads of the city. The city attorney is required to appear on behalf of the City of Columbia or City Council in all matters unless the city attorney has designated or employed a party to perform duties on behalf of the city attorney. *Sec. 2-115 of the City of Columbia Code of Ordinances.* The city attorney did not appear on behalf of the City of Columbia or City Council before the Respondent in this zoning board appeal involving the Appellant's appeal nor is there any evidence that the city attorney designated Chaplin Spencer to appear on the city attorney's behalf before the Respondent.

Chaplin Spencer appeared before the Respondent and requested that the Respondent deny the Appellant's request for a special exception based upon its proximity to schools, residences, and other liquor stores. Mr. Spencer asserted that he was acting under the authority of the City Council and that his firm's job was to examine and to only oppose granting special exceptions to liquor stores. [R. p. 116, line 26 – 34; BOZA Video filed separately.]

Several parties testified before the Respondent stating their objections to granting the special exception to the Appellant; however, none of these parties testified as to any specific incidents or injuries to their own specific property nor did they provide competent testimony on how the Appellant's liquor store would negatively affect the value of their own specific property. [R. p. 115, line 36 – p. 124, line 32; pp. 067 -082, 084-086, 090 -094; BOZA Video filed separately.]

By order dated June 24, 2013, the Petitioner's request for a special exception to open a liquor store was denied. [R. pp. 001-002; 064-065.]

ARGUMENT

I.

THE TRIAL COURT ERRED IN DETERMINING THAT THE RESPONDENT'S DECISION TO DENY THE APPELLANTS REQUEST FOR A SPECIAL EXCEPTION TO OPERATE A LIQUOR STORE WAS NOT ARBITRARY AND CAPRICIOUS WHERE THE RESPONDENT DID NOT ADHERE TO ITS OWN CRITERIA FOR GRANTING SPECIAL EXCEPTIONS.

The Appellant's convenience and liquor store is located in what is considered a general commercial district. *Sec. 17-240 of the City of Columbia Code of Ordinances* states the following:

The C-3 district is intended to accommodate a variety of general commercial and nonresidential uses characterized primarily by retail, office and service establishments and oriented primarily to major traffic arteries or extensive areas of predominantly commercial usage and characteristics. Certain related structures and uses are permitted outright or are permissible as special exceptions subject to restrictions and requirements intended to best fulfill the intent of this article. It is not the intent of this article to encourage the development of long, narrow strips of commercial development fronting on major arteries, often referred to as strip commercial areas. Such development is often incompatible with adjacent uses and may lead to the eventual formation of commercial slums, damage the traffic-carrying capacities of streets, increase congestion, lead to depreciation of property values in adjacent areas, encourage undue dispersion of commercial facilities to the inconvenience of the public, and create disproportionate costs in the provision of governmental services.

§17-258 of the City of Columbia Code of Ordinances indicates that the operation of a liquor store in a C-3 District requires approval and the granting of a special exception by the Respondent.

The *South Carolina Local Government Comprehensive Planning Enabling Act of 1994* provided powers to the local governmental agencies "to undertake a continuing planning program for the physical, social, and economic growth, development, and redevelopment of the area within its jurisdiction." *S.C. Ann. § 6-29-340 of the South Carolina Code of Laws.*

S.C. Ann. § 6-29-800 generally provides zoning appeal boards with the following exclusive powers applicable to this case:

1. To hear and decide appeals for variance from the requirements of the zoning ordinance when strict application of the provisions of the ordinance would result in unnecessary hardship;
2. To permit uses by Special Exception when designated within the zoning code;
3. To hear and decide appeals where it is alleged there is an error in an order, requirement, decision or determination made by an administrative official in the enforcement of the zoning ordinance ...

The City of Columbia created the Respondent for such a purpose as stated above. The Board of Zoning Appeals has the power to grant special exceptions in C-3 general commercial districts. The powers enumerated under *Sec. 17-112 of the City of Columbia Code of Ordinances* are as follows regarding special exceptions:

- ... (2) *Special exceptions.*
 - a. *Duties.* Duties of the board are as follows:
 1. Hear and decide only the applications for special exceptions as the board of zoning appeals is specifically authorized to pass upon by terms of this article;

2. Decide the questions as are involved in determining whether special exceptions should be granted;
 3. Prescribe appropriate conditions and safeguards in conformity with this article; and
 4. Deny special exceptions when not in harmony with the intent and purpose of this article.
- b. *Procedures in consideration of special exception applications.*
1. A written application for a special exception shall be submitted indicating the section of this article under which the special exception is sought and stating the grounds on which it is requested.
 2. Notice of public hearing shall be posted on the property for which special exception is sought and shall be published at least 15 days prior to the public hearing in a newspaper of general circulation in the city.
 3. The public hearing shall be held. Any party may appear in person, or by agent or attorney.
 4. The board of zoning appeals 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.
 5. The board of zoning appeals shall not vary the conditions and/or provisions of sections 17-259 through 17-274 that establish specific standards that must be met prior to the establishment of several principal uses that require a special exception.
 6. The board of zoning appeals may prescribe a time limit within which the action for which the special exception is required shall be begun or completed, or both.
- c. *Criteria for special exceptions.* In addition to definitive standards in this article, the board of zoning appeals 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.
- d. *Effect of failure to meet conditions.*
1. Violation of conditions and safeguards prescribed in conformity with this article, when made a part of the terms

under which a special exception is granted, shall be deemed a violation of this article, punishable under the penalties established in this article.

2. Failure to begin or complete, or begin and complete, an action for which a special exception is required, within the time limit specified, when such time limit is made a part of the terms under which the special exception is granted, shall void the special exception. [R. pp. 127 – 129.]

The Respondent, in its Order, found that granting the special exception would adversely affect the public interest of the area due to the proximity to a school, that this "proliferation of liquor stores" would result in a depreciation in homes values in the surrounding area, that would create vehicular or safety problems for that street, and that it would impact the aesthetic character of the area. To the Appellant's favor, the Respondent determined that granting the special exception would not negatively impact traffic circulation or would not create noise, lights, fumes, or otherwise cause any obstructions to the detriment of adjoining properties or would negatively impact the orientation or spacing of improvements. [R. pp. 001-002; 064-065.]

There is no credible evidence that the Appellant's store would adversely affect the public interest due to the proximity to a middle school nor is there any evidence that there is a "proliferation of liquor stores in the area." The board references how the Petitioner's liquor store would adversely affect the middle school and how a "proliferation of liquor stores in the area" would contribute to depreciation in home values; however, this assertion by the board is merely opinion and conjecture and not supported by any evidence in the record. The record clearly shows that there is one liquor store (Northway Package Store) directly in front of Alcorn Middle School; however, the record shows no "proliferation" of liquor stores as there are no other liquor stores on Fairfield Road within one-mile proximity of Alcorn Middle School. [R. pp. 067 –

068, 070 – 076.] In fact, nine (9) out of the fifteen (15) stores that the residents testified to as selling alcohol (as part of their evidence at the hearing) were not even located on Fairfield Road. [R. p. 073.] The record reflects that nine (9) of the stores were gas stations, two (2) were grocery stores, two (2) were drug stores, and only two (2) other businesses were sole liquor stores; Northway Package Store is located on Fairfield Road and the other sole liquor stores was located on North Main Street. [R. p. 074.]

The Respondent placed undue weight on the testimony of the residents as there was no testimony as to any specific incidents involving either the Appellant's store or Northway Package store which positively or negatively impacted the middle school or no testimony as to any specific incidents which caused the depreciation of any home values for any resident that testified at the hearing. The residents testified and presented crime statistics for the area and it only showed that the Appellant's business was burglarized once over a one year period. [R. pp. 078 – 080.] In addition, these same statistics showed no crime occurred at either the Food Lion or the Northway Package liquor store and both are located across from Alcorn Middle School; both of these businesses also sell alcohol and are next to the Appellant's place of business. [R. p. 082.] The residents' testimony relied upon data incorporating stores and businesses not located on Fairfield Road and near Alcorn Middle School. It should be noted that when the Respondent asked the residential witness Rhodes if there had been any incidents around the Appellant's location, the witness' response was "not yet." [R. p. 115, line 35 – p. 116, line 14; BOZA Video filed separately.] Furthermore, when the law enforcement Officer Hartley was asked specifically whether " the data shows a correlation between the increase of liquor stores and the increase of crime, her

response was, "Specific to liquor stores it does not support an increase in crime." [R. p. 124, lines 13 – 32; BOZA Video filed separately.] These statements illustrate that the witnesses were speculating about potential problems when they testified at the hearing; however, none of the witnesses provided specific competent or specific factual evidence of actual injury to their respective properties nor did the witnesses provide any specific competent or specific factual evidence to the Respondent to warrant denying the special exception. [R. p. 115, line 35 – p. 124, line 32.]

In *Bannum v. City of Columbia*, 335 S.C. 202, 516 SE2d. 439 (1999), our Supreme Court reversed the decision of the zoning board based upon the finding that the board's decision was arbitrary. In *Bannum*, the applicant requested a special exception to operate a half way house in the City of Columbia. At the hearing, opposing parties testified to their objections to granting the special exception for the half way house based upon traffic concerns, foot traffic, and a study indicating that these individuals living in the half way house are likely to repeat committing crimes. The City of Columbia's zoning board denied the request for a special exception based upon this testimony. Our Supreme Court determined that there was no "concrete" evidence to support the opposing parties' views and opinions; furthermore, the Supreme Court determined that the board ignored all evidence offered by the applicant to show satisfaction of the exceptions to the ordinance requirements. The court concluded that the board's decision was based on the unsubstantiated concerns and testimony of the neighboring residents rather than on the requirements for a special exception set out in the ordinance.

In *Windham Enterprises v. The City of North Augusta*, 735 S.E.2d 659 (S.C.App. 2012), the Court of Appeals reversed the decision of the zoning board based upon the finding that the board's decision was arbitrary and capricious and reaffirming the decision in *Bannum*. In the *Windham Enterprises* case, the applicant sought a special exception to operate a fireworks store. At the hearing for the special exception, residents testified as to their objections to granting the special exception for the fireworks store based upon traffic concerns, a concern that the store would cause a decline in property value, and based upon the negative effect the store would have on the community. The zoning board denied the special exception due to the concerns of the residents. The Court of Appeals reversed this decision and held that the board's decision must be supported by competent, substantial, and material evidence. The Court of Appeals determined that the testimony of the residents did not meet that competent standard because the residents did not testify as to any specific injury to their own property nor did the residents sufficiently articulate how the fireworks store would either depreciate their individual property or stand in contrast to other commercial businesses in the area that did not need to seek a special exception.

The general rule is that reviewing courts will not disturb the findings of the zoning boards unless such findings or decisions resulted from action of the board which is arbitrary, an abuse of discretion, illegal or in excess of lawfully delegated authority; furthermore, the board must apply the criteria imposed by the zoning ordinance in either granting or denying a request for a special exception. See *Bannum*. The Respondent cites *Vulcan Materials Co. v. Greenville County Board of Zoning Appeals*, 342 S.C. 480, 536 S.E.2d 892 (Ct. App. 2000) for its proposition that the zoning board's findings of

facts equates to jury findings; but, *Vulcan* also states that "the decision of the zoning board will not be upheld where it is based on errors of law, . . . or where there is no legal evidence to support it, or where the board acts arbitrarily or unreasonably, . . . or where, in general, the board has abused its discretion." In this case, the Respondent has acted arbitrarily and there is no evidence to support its conclusions.

The testimony of the residents in opposition of the special exception was based upon pure speculation and opinion with no definitive standard as required by law. This speculation encompassed a decline in property values, an increased risk of vehicular or pedestrian safety problems, an increase in crime, and a negative impact on the aesthetic character of the area. The Respondent placed undue weight on this speculative testimony and failed to consider that there was no credible or competent testimony which distinguished the effect of the Appellant's liquor store from the effects of either the Food Lion selling alcohol at its store or the Northway Package store selling liquor across from the Alcorn Middle School. In addition, there was no competent evidence to support that the Appellant's liquor store would create vehicular or pedestrian safety problems. There was no testimony or evidence of increased accidents or pedestrian problems before the Appellant's application for the special exception nor was there any testimony or competent evidence presented which distinguishes why the Appellant's store would pose a greater risk than either Food Lion or Northway Package since all of these stores are all located on the same side of the road and within close proximity to each other. The fact remains that the location where the Appellant's business is located housed many previous commercial businesses before the Appellant opened his store and there was no testimony as to prior problems

with vehicle or pedestrian safety when the previous tenants operated at the same location as the Appellant's store.

In addition, The Respondent arbitrarily sites a proliferation of signs as a reason for denying the special exception; however, the Appellant offered to make any corrections so as to not affect the aesthetic character of the area. The Appellant had a limited number of signage on the building itself and offered to remove any signage to comply with any conditions the Respondent could have prescribed in lieu of denying the special exception. [R. p. 124, line 35 – p. 125, line 14; BOZA Video filed separately.] The Respondent refused to offer the Appellant the opportunity to remove some signage though it was within the Respondent's power to do so and again reaffirming that the Respondent's decision was arbitrary and capricious.

The Appellant's position is identical to the fireworks store owner's position in *Wyndham Enterprises*. In this case as well as *Wyndham Enterprises*, residents testified as to concerns about increased traffic, concerns about decreased home and property values, and concerned about the aesthetics of the business. In this case as well as *Wyndham Enterprises*, witnesses testified exclusively on conjecture and general opinion with no competent testimony as to any specific injuries to their respective property. In this case as well as *Wyndham Enterprises*, the Respondent's decision was arbitrary and capricious and "was not supported by competent, substantial, and material evidence."

The Respondent's decision to deny the Appellant's request for a special exception to open a liquor store was arbitrary and capricious and not supported by any factual evidence to support its decision. The Respondent's decision was based upon opinion and conjecture with no competent evidence to support the testimony of the

witnesses in opposition of granting the special exception; therefore, the decision of the Court affirming the Respondent's decision to deny the request for a special exception to open a liquor should be reversed and the special exception should be granted to the Appellant.

ARGUMENT

II.

THE TRIAL COURT ERRED IN DETERMINING THAT THE APPELLANT WAS NOT PREJUDICED BY A CONFLICT OF INTEREST BETWEEN THE RESPONDENT, CITY COUNCIL, AND PRIVATE COUNSEL WHEN CITY COUNCIL HIRED PRIVATE COUNSEL TO ARGUE BEFORE THE RESPONDENT WHICH IS AN ADMINISTRATIVE AGENCY OF THE CITY OF COLUMBIA.

A conflict of interest has been generally defined as a set of circumstances that creates a risk that professional judgment or actions regarding a primary interest will be unduly influenced by a secondary interest. *Wikipedia, Conflict of Interest*, http://en.wikipedia.org/wiki/Conflict_of_interest (as of June 13, 2013 at 14:32).

Pursuant to *Sec. 2-151 of the City of Columbia Code of Ordinances*, the city created the following departments:

- (a) The following departments of the city are created:
 - (1) City clerk;
 - (2) Information technology;
 - (3) Finance;
 - (4) Legal;
 - (5) Human resources;
 - (6) Municipal court;
 - (7) Police;
 - (8) Fire;
 - (9) Public works;
 - (10) Utilities and engineering;
 - (11) Community development;
 - (12) Parks and recreation;
 - (13) General services;

- (14) Economic development;
- (15) Zoning, inspections and planning;
- (16) Construction management;
- (17) Public relations;
- (18) Communications (911/311).

- (b) The head of each department shall be a director, who shall be an officer of the city and shall have supervision and control of his department, subject to the city manager. The city manager may serve as director of one or more departments or divisions within any department.
- (c) Each department head shall be responsible for preparation of departmental and administrative regulations and procedures subject to the review and approval of the city manager.

Sec. 2-115 of the City of Columbia Code of Ordinances addresses the role of the City Attorney within City of Columbia management and states:

City attorney.

- (a) *Appointment.* The city council shall appoint a city attorney and labor counsel, who shall serve at its pleasure.
- (b) *Duties.* The city attorney shall be the chief legal counsel to the city, the mayor and members of the council and the city manager and to the officers and department heads of the city. The city attorney shall prosecute and defend the city in all actions and appear on behalf of the city and its officers in legal proceedings. The city attorney shall prepare or supervise the preparation of all legal documents and instruments of the city and shall approve all ordinances, resolutions, contracts and related documents as to form. The city attorney may employ assistant city attorneys and legal assistants as necessary for the performance of his duties, when such positions are provided for in the city budget. When requested the city attorney shall attend meetings of the council, render legal opinions, represent the city at meetings and conferences and perform such other duties as prescribed by law and by the city council.

Sec. 2-128 of the City of Columbia Code of Ordinances addresses the role of the Director of Zoning and States as follows:

Director of zoning, inspections and planning.

The director of zoning, inspections, and planning, subject to the city manager, shall have administrative supervision over the activities relating to zoning, building codes, building inspections and property maintenance codes, and planning, and shall perform such additional duties as may be assigned to him by the city manager.

Sec. 17-81 of the City of Columbia Code of Ordinances addresses the responsibilities of the zoning administrator in its relationship with the City Counsel and states as follows:

Responsibility for administration.

- (a) *Zoning administrator.* A zoning administrator designated by the city manager shall administer and enforce this article. The zoning administrator may be provided with the assistance of such other persons as the city manager may direct. It is the intent of this article that all questions of administration and enforcement shall first be presented to the zoning administrator and that such questions shall be presented to the board of zoning appeals only upon reference by, or appeal from, the zoning administrator, and that recourse from the decisions of the board of zoning appeals shall be to the courts as provided by law.
- (b) *City council.* It is further the intent of this article that the function of the city council under this article shall not include hearing and deciding questions of interpretation and enforcement which may arise, but that the city council shall have only the responsibility for acting on proposals for amendment or repeal of this article, and for establishing a schedule of fees and charges as provided in this article.

Conflict of interest has been defined in our South Carolina Code of Laws and in the South Carolina Rules of Professional Conduct. Specifically to this case, §8-13-70 of the South Carolina Code of Laws addresses the issue of representation of another by a public official, member, or employee before a governmental entity. Subsection (A)(5) and (6) state the following:

- 5. A public official, public member, or public employee of a municipality may not knowingly represent a person before

any agency, unit, or subunit of that municipality for which the public official, public member, or public employee has official responsibility except as required by law.

6. A public employee, other than those specified in items (4) and (5) of this subsection, receiving compensation other than reimbursement or per diem payments for his official duties, an individual with whom he is associated, or a business with which he is associated may not knowingly represent a person before an entity on the same level of government for which the public official, public member, or public employee has official responsibility except:

- (a) as required by law;
- (b) before a court under the unified judicial system; or
- (c) in a contested case, as defined in Section 1-23-310, excluding a contested case for a rate or price fixing matter before the South Carolina Public Service Commission or the South Carolina Department of Insurance, or in an agency's consideration of the drafting and promulgation of regulations under Chapter 23 of Title 1 in a public hearing.

Rule 1.7 of the South Carolina Rules of Professional Conduct states: (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

1. the representation of one client will be directly adverse to another client; or
2. there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Rule 1.7 (l) of the South Carolina Rules of Professional Conduct goes on to state the following:

In any adversarial proceeding, a lawyer shall not serve as both an advocate and an advisor to the hearing officer, trial judge or trier of fact ...

In this case, it is clear that City Council has sought to do something that it could not do lawfully. First, City Council sought to unduly influence the Respondent when the City Council's sole "function under this article shall not include hearing and deciding questions of interpretation and enforcement which may arise..." Second, City Council sought to circumvent this rule by hiring private counsel to assert its interpretation and influence before the Respondent. There was a conflict of interest between the Respondent, City Council, and private counsel.

The City of Columbia has a city attorney who is empowered with the sole duties to appear on behalf of the city and all of the city's departments and/or to approve all documents and contracts related to the City of Columbia's daily business; however, the city attorney for the City of Columbia did not appear at the hearing to argue the City of Columbia's position in this matter. The city attorney could not appear because of the obvious and inherent conflict of litigating a matter where the city attorney represents both the interests of City Council and the interests of the Respondent and where the city attorney would be unlawfully attempting to influence the Respondent on behalf of City Council. The city attorney was well versed in the law that the Respondent has the sole power to grant special exceptions in C-3 general commercial districts and that City Council is required to play absolutely no role in either interpreting or influencing the decisions of the Respondent. See *S.C. Ann. § 6-29-800, Sec 17-112; Sec. 17-81*. There is no evidence in the record that the city attorney authorized or employed private counsel to represent the interests of the City of Columbia or City Council in opposing the granting of the special exception in this case which is the sole duty of the city

attorney. See *Sec. 2-115*. The question that this appellate court should consider and require the Respondent to answer is whether or not the city attorney for the City of Columbia could have appeared before the Respondent to argue against granting the special exception to the Appellant. The Appellant would contend that if the answer to that question is "no," then a conflict of interest existed at the time of this hearing which warrants reversal of the reversal of the Respondent's decision to deny the special exception to the Appellant. The Appellant was prejudiced by this conflict which resulted in the denial of his request for a special exception.

The reversal of the Respondent's decision to deny the special exception to the Appellant due to a conflict of interest between the Respondent, City Council, and private counsel is the proper remedy of this matter; this conflict of interest caused undue influence and prejudice in the Respondent's decision making process. The Appellant was prejudiced by City Council's decision to hire private counsel to oppose only his special exception to open a liquor store before the Respondent. City Council influenced the Respondent by sending a "public employee" of the City of Columbia or City Council to appear before the Respondent knowing full well that City Council appoints all the members of the Respondent's independent board. Chaplin Spencer made it very clear that he knew was representing City Council, that he knew he was speaking on the City's behalf, and that he knew the Respondent was an independent board; Mr. Spencer was not speaking for the public. [R. p. 116, line 26 – p. 120, line 2; BOZA Video filed separately.] In fact, Mr. Spencer never stated that he was a resident of the community where the Appellant's store was located; therefore, any public testimony on his part should have carried no weight since he was not an interested property owner in the

community where the Appellant's store was located. It appears that §8-13-70 (A) (5) or (6) was violated when Chaplin Spencer appeared before the Respondent to represent City Council. As a public employee counsel, much like the city attorney, Mr. Spencer could not appear before the Respondent to argue on behalf of City Council because of a conflict of interest; Mr. Spencer had an official responsibility to counsel both agencies as a public employee. The conflict of interest is further evident when Mr. Spencer would not fully disclose the scope of his representation of City Council even though he actually owed a duty to both parties at and during the hearing. [R. p. 118, line 18 – p. 119, line 5; BOZA Video filed separately.] The violation of the state conflict of law statute warrants reversal of the Respondent's decision to deny the Appellant's request for a special exception to open a liquor store.

The Appellant contends that the Respondent placed a great deal of undue weight on the testimony of the Mr. Spencer who was clearly acting as a de facto city attorney for the City of Columbia. One merely needs to look at the colloquy between the Respondent and Chaplin Spencer to understand the deference the Respondent paid towards Mr. Spencer's opinions. The Respondent asked Mr. Spencer to work with City Council to "avoid some of the appeals" and stated that "the issues that you raised on behalf of the council can be of direct interest in our decision making." [R. p. 117, lines 30 - 42; BOZA Video filed separately.] The Respondent goes on to ask Mr. Spencer to "give me some specifics you think would help minimize the impact of this use, if it were to be approved." [R. p. 117, line 43 – p. 118, line 6; BOZA Video filed separately.] In addition, the Respondent goes on to ask Mr. Spencer that he "work with staff to facilitate

better discussion between the two bodies" ... [R. p. 119, lines 23 – 34; BOZA Video filed separately.]

The Appellant would point out that one board member of the Respondent did state that it did "irk" her that City Council would send someone before the Respondent to represent the city in this zoning appeal matter "since we are appointed by the City Council." [R. p. 119, line 36 – p. 120, line 3; BOZA Video filed separately.] The Appellant would contend that this statement illustrates that this board member of the Respondent recognized that there was an inherent conflict with City Council hiring private counsel to appear before the Respondent to influence the Respondent's decision.

City Council is required by law to play absolutely no role in arguing before the Respondent in these contested board hearings on zoning appeals nor should City Council hire private counsel to argue in these zoning appeal matters. It is clear that City Council's only perfunctory role in the Respondent's matters is to act on proposals for amendment or repeal of this article, and for establishing a schedule of fees and charges. See *Sec. 17-81*. The hiring of private counsel by City Council violated *Sec. 17-81*, in that private counsel, while representing the interest of the City of Columbia and City Council, was deciding "questions of interpretation and enforcement" as it applies to special exceptions in only alcohol cases. The Respondent is an independent agency with the sole and responsibility of deciding zoning appeals and variances according to the City of Columbia ordinance. City Council willfully acted outside the scope of its powers to influence the Respondent and this undue influence resulted in

prejudice to the Appellant when his request for a special exception to open a liquor store was denied.

The Appellant was also prejudiced by not receiving any notice that City Council had retained private counsel for the hearing. Mr. Spencer stated that it was unusual for him to appear before the Respondent on behalf of the City of Columbia. [R. pp. 116, lines 30 – 34; BOZA Video filed separately.] The Appellant was not aware of the conflict of interest between the Respondent, City Council, and private counsel at the time of the hearing; therefore, the Appellant did not have an opportunity to retain counsel to raise the issue of a conflict of interest between the Respondent, City Council, and private counsel, Chaplin Spencer. Furthermore, there is no evidence that the Appellant waived his right to argue that he was prejudiced by this conflict of interest that resulted in the denial of his request for a special exception to open a liquor store.

The Appellant was prejudiced by the conflict of interest between the Respondent, City Council, and private counsel which resulted in the denial of his request for a special exception to open a liquor store. The Appellant would sustain a great financial loss from his investment in the liquor store if the decision to deny this request for special exception is affirmed. City Council acted outside the scope of its powers in zoning board matters by advocating a role of interpretation and enforcement. Mr. Spencer acted as a de facto city attorney when he appeared before the Respondent; as a de facto city attorney, Mr. Spencer should not have testified before the board as counsel essentially represented both City Council and the Respondent in his role as a de facto city attorney. The Respondent placed undue weight on the testimony and counsel in the law from Mr. Spencer; however, Mr. Spencer never counseled the Respondent on

the fact that his appearance was a conflict of interest between City Council and the Respondent. The Appellant received no disclosure that City Council was retaining private counsel for this hearing, the Appellant received no notice of this conflict of interest, the Appellant did not waive his right to object to this conflict of interest between all of the parties, and the Appellant sustained prejudice and a financial loss as a result of this conflict and denial of his request for a special exception to open his liquor store; therefore, the trial courts determination that there was no conflict or prejudice was an error in law and should be reversed.

CONCLUSION

For the reasons stated above, this Court should reverse the decision of the Respondent and trial court and grant the Appellant's request for a special exception to open the liquor store.

February 11, 2015

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Case No.: 2013-CP-40-4051

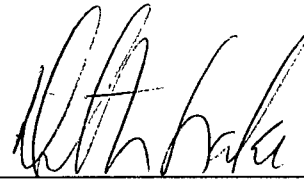
Andreas Ganotakis, d/b/a Seven Days Food Mart, LLC,Appellant,

v.

City of Columbia Board of Zoning Appeals,Respondent.

CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellant hereby certifies that this Final Appellant's Brief is identical to the Initial Appellant's Brief, except for inclusion of references to the Record and correction of typographical errors and/or misspellings, and it otherwise complies with Rule 211 (b) SCACR.



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PROOF OF SERVICE

The undersigned counsel for the Appellant hereby certifies that the Appellant's Final Brief was served and delivered upon counsel for the Respondent by U.S. mail to: Peter M. Balthazor, Riley Pope & Laney, LLC, P.O. Box 11412, Columbia, SC 29211.

February 17, 2015



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