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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

JUN 15 2016

**SC SUPREME COURT**

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

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

**RECEIVED**

Case No.: 2013-CP-40-4051

JUN 15 2016

**SC Court of Appeals**

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

v.

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

PETITION FOR WRIT OF CERTIORARI

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## CERTIFICATE OF COUNSEL

The undersigned, an attorney in this matter for the Petitioners, certifies that a Petition for Rehearing was filed with, and ruled upon by the Court of Appeals prior to the filing of this Petition for Writ of Certiorari.

### QUESTIONS PRESENTED

Pursuant to Rule 242, SCACR, the Petitioner Andreas Ganotakis d/b/a Seven Days Food Mart, LLC, petition this Court for a Writ of Certiorari to the Court of Appeals to review that court's decision in this matter. The Petitioner respectfully asserts that the Court of Appeals erred in its Opinion No.: 2016-UP-153 (filed March 30, 2016), and that this Court should review the following issues:

1. Did the Court of Appeals err in affirming the trial court's decision to not reverse the decision of the Respondent denying the special exception to the Petitioner where there was evidence that 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?
  
2. Did the Court of Appeals err in affirming the trial court's decision that the Petitioner was not prejudiced by any conflict of interest between the Respondent, City Council, and private counsel hired by City Council, where there was evidence that the Petitioner's request for a special exception was denied because City Council sought to influence the decisions of the Respondent?

## STATEMENT OF THE CASE

The Appellant filed a letter of agency and an application for special exception for a liquor store located at 5050 Fairfield Road, Columbia, South Carolina on May 15, 2013. [Application]. The application summary lists a case number of 13-041-SE and states that the building is located in a C-3 (General Commercial) zoning district. [BOZA Case Summary for Application]. 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 Appellant and a witness in favor of granting the request for a special exception to operate a liquor store. [BOZA video; Ganotakis BOZA Transcript]. The Respondent also heard from Chaplin Spencer, private counsel hired by the City of Columbia, and several other witnesses opposing the request for special exception. The City of Columbia 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 never received notice nor did the Appellant have any knowledge that Chaplin Spencer would appear on behalf of the City of Columbia and argue against granting the special exception. At the conclusion of the hearing, the Appellant's request for a special exception was denied. [Order on a Special Exception]. The Respondent did not follow its own guidelines for

granting special exceptions for liquor stores in C-3 districts when it denied the Appellant's request for a special exception to open a liquor store.

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. [Appeal]. The Respondent filed its' Return on August 22, 2013. [Return].

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. [Petitioner's Brief; Memorandum of Law in Opposition to Petition for Appeal]. 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 and counsel for the Respondent presented oral arguments in opposition to affirming the Respondent's decision and denying the Appellant's special request. [Transcript pp. 2-23]. On June 4, 2014, the Circuit Court issued an Order affirming the Respondent's decision to deny the special exception to the Appellant. [June 4, 2014 Order].

The Appellant timely filed his Motion for Reconsideration on June 11, 2014. [Motion for Reconsideration]. The Appellant's Motion for Reconsideration was denied by Order of July 30, 2014. [July 30, 2014 Order]. The Appellant filed his Notice of Appeal on August 25, 2014. [Notice of Appeal].

On March 30, 2016, the Court of Appeals filed an unpublished *per curiam* opinion affirming the decision in the circuit court. The Petitioner timely filed a Petition for Rehearing, which the Court of Appeals denied in an order filed on May 20, 2016.

## ARGUMENT

### 1. Arbitrary and Capricious Determination

The Petitioner contends that the Respondent's decision to deny the Petitioner's request for a special exception to open a liquor store was arbitrary and capricious and not supported by any factual evidence. Furthermore, the Petitioner contends that the Respondent did not follow its own criteria for granting special exceptions for liquor stores in that mixed use district.

Pursuant to powers enumerated under *Sec. 17-112 of the City of Columbia Code of Ordinances*, The Board of Zoning Appeals has the power to grant special exceptions in C-3 general commercial districts considering only the following criteria:

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, the powers enumerated under *Sec. 17-112 of the City of Columbia Code of Ordinances* 2 (b)(5)(6) states that the zoning board "*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; and 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.*" [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 a

"proliferation of liquor stores" would result in a depreciation in homes values in the surrounding area, that the liquor store would create vehicular or safety problems for that street, and that the liquor store would impact the aesthetic character of the area. The Respondent determined in favor of the Petitioner 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 was no credible evidence in the record that the Petitioner'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;" neither of these two are listed in the criteria for granting special exceptions. The Respondent referenced 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, the record clearly showed that there is one liquor store (Northway Package Store) directly in front of Alcorn Middle School; however, the record showed 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.] Specifically, 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.] Furthermore, the record reflected 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. The Respondent's assertion of a proliferation of liquor stores was merely opinion and conjecture and not supported by any evidence in the record.

No witnesses at the zoning board hearing provided any competent or specific factual evidence or testimony of any actual injury to their respective properties to the Respondent to warrant denying the special exception. [R. p. 115, line 35 – p. 124, line 32.] The residents presented crime statistics for the area and it only showed that the Petitioner'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. That data is significant because both Food Lion and Northway Package liquor store sell alcohol and are next to the Appellant's place of business on the left hand side of the road. [R. p. 082.] Officer Hartley was asked specifically whether there was any data that showed 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.]

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. This Supreme Court determined that there was no "concrete" evidence to support the opposing parties' views and opinions; furthermore, this 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.

In support of its conclusion on this issue, the Court of Appeals cited *Rest. Row Assoc. v. Horry Cty.*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999). The basic premise of *Rest Row Assocs.* was that the court would not substitute its judgment for that of the board; further stating that the board's decision "must be treated in the same manner as a finding of fact by the jury;" but, even *Rest Row Assocs.* states that the appellate court may reverse the Respondent's and trial court's decisions when the decision is "arbitrary or clearly erroneous." The issue in *Rest Row Assocs.* addressed whether the appealing party proved an unnecessary hardship at the zoning board hearing to obtain a hardship. In *Rest Row Assocs.*, the appealing party had the sole burden of proof of unnecessary hardship to establish the variance because an "adult" store by rule was not allowed in the district. The zoning board determined that the appealing party had not met its burden and therefore the board's findings of facts were conclusive.

The Court of Appeals sole reliance upon *Rest Row Assocs.* is misplaced because the Petitioner's case presents no such similar issue as which was stated in *Rest Row Assocs.* The Court of Appeals offered no other analogous cases to the Petitioner's case to support their opinion. In this case, the Petitioner had no such burden of proof as indicated in *Rest Row Assocs.* because liquor stores are allowed in the district so long as the criteria for granting the special exception was followed and met. In addition, Columbia city's ordinance allows a party to conform and/or modify the business to allow the business an opportunity to meet the criteria. The Petitioner offered to remove any signage and agreed to comply with any conditions the Respondent would have prescribed to obtain the special exception. There were other

alternatives available to Respondent since the Petitioner was already lawfully selling beer and wine at that business location before the request for the special exception; the Petitioner is allowed to sell beer and wine at this same location without seeking 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. Vulcan Materials Co. v. Greenville County Board of Zoning Appeals*, 342 S.C. 480, 536 S.E.2d 892 (Ct. App. 2000) 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 acted arbitrarily as there was no evidence to support its conclusions. The witness testimony was speculative, there was no competent evidence to support that the Petitioner's liquor store would create vehicular or pedestrian safety problems, and 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, all three sell alcohol, and all three are within close proximity to each other. In fact,

the Appellant's business sells beer and wine already at that location and there was no testimony about prior problems with vehicle or pedestrian safety.

The Petitioner would remind this Supreme Court that the Petitioner's position is identical to the fireworks store owner's position in *Wyndham Enterprises* which the Court of Appeals had already decided. 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 Petitioner's request for a special exception to open a liquor store was arbitrary and capricious and was 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. The trial court failed to consider all the factors that illustrated that the Respondent's decision was arbitrary and capricious; the trial judge abused his discretion. Therefore, the Court of Appeals also erred in affirming the trial judge's based upon the *Rest Row* case. The Court of Appeals also erred by not considering previous rulings on the issue of arbitrary and capricious decisions by the board as set forth in *Bannum* and *Wyndham Enterprises*. While appellate courts cannot substitute its own judgment for that of the trial judge, this

Supreme Court has the power to reverse the trial court's decision when the trial court's decision was clearly erroneous. The Court of Appeals failed to do that; therefore this Supreme Court should grant a writ of certiorari to review that decision.

**2. Conflict of Interest**

The Petitioner contends that there was a conflict of interest between the board, city council, and private counsel. In addition, the Petitioner contends that city council violated its own ordinance in by influencing the board in the board's decision making role through private council. City's council's influence was a contributing factor in the board's decision to deny the Petitioner's request for a special exception; the denial of this special exception was actual prejudice to the Petitioner.

In affirming the trial court's opinion, the Court of Appeals did not address whether there was in fact a conflict of interest between the parties; furthermore, the Court of Appeals did not address whether City Council violated its own ordinance by sending private counsel to influence the board in the board's zoning decision.

*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.

The Petitioner contends there was a conflict of interest between the Respondent, City Council, and private counsel. Private council appeared to serve as both an advocate for City Council and an advisor to the zoning board in this adversarial hearing to the detriment of the Petitioner. City Council was clearly aware that it could not send the city attorney to argue council's position before the board, so it sought to circumvent their own ordinance by hiring and sending private council down on council's behalf.

The Court of Appeals in its opinion merely defined when a conflict of interest existed, but the Court of Appeals never answered the question of whether there was a conflict of interest between the Respondent, City Council, and the attorney for City Council; in addition, the Court of Appeals never addressed whether the Petitioner was prejudiced by this conflict of interest between the Respondent, City Council, and the attorney for City Council. A search of the Court of Appeals opinion provides no answers to these two issues of conflict of interest and the prejudice associated with it.

The Court of Appeals appeared to ignore the fact that the city attorney never appeared before the Respondent on behalf of City's Council's to state council's position on liquor stores in the district; the city attorney's sole duty is 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. The Petitioner contends the city

attorney did 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 clearly knew that the Respondent had the sole power to grant special exceptions in C-3 general commercial districts and that City Council was 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*. The Court of Appeals opinion never considers the question as to 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 Petitioner. The Petitioner would contend that if this Supreme Court was to answer "no" to this above stated question, then a conflict of interest existed with private counsel at the time of this hearing which warrants reversal of the Respondent's decision to deny the special exception to the Petitioner. The Petitioner was prejudiced by this conflict which resulted in the denial of his request for a special exception.

There is no indication that the trial judge considered whether there was a conflict between the Respondent, City Council, and private counsel before the trial court made its decision. Furthermore, there is no indication that the trial judge considered whether City Council violated the city's ordinance in hiring private counsel to influence a zoning board decision. The Petitioner contends City Council willfully acted outside the scope of its powers to influence the Respondent and this undue influence resulted in prejudice to the Petitioner when his request for a special exception to open a liquor store was denied. The trial court's decision that there was no conflict of interest was erroneous

because it did not consider the above-stated facts; therefore, the trial court's decision was reversible based upon an abuse of discretion. By failing to address these issues in its decision, the Court of Appeals overlooked clear evidence of a conflict of interest and prejudice to the Petitioner from the denial of this special exception. While the appellate courts cannot substitute its own judgment for that of the trial judge, this Supreme Court has the power to reverse the trial court's decision when the trial court's decision was clearly erroneous. The Court of Appeals failed to do that; therefore this Supreme Court should grant a writ of certiorari to review that decision.

### CONCLUSION

Based on the arguments and authorities set forth above, this Court should grant the petition and review the decision by the Court of Appeals.

Respectfully submitted,



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