

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 2016-UP-153 (S.C. Ct. App. filed March 30, 2016)

RECEIVED
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SC SUPREME COURT

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

v.

City of Columbia Board of Zoning Appeals Respondent.

RESPONDENT'S RETURN TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals correctly determined that Respondent's decision to deny Petitioner's request for a special exception to operate a liquor store was not arbitrary and capricious.
2. Whether the court of appeals correctly determined that Petitioner was not prejudiced by a conflict of interest where the City of Columbia City Council hired private counsel to appear at the hearing on Petitioner's request for a special exception.

STATEMENT OF THE CASE

This is a local zoning case. Petitioner 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, Petitioner applied for a special exception from the Board of Zoning Appeals (hereinafter the “Board” or “Respondent”).

A public hearing was held on the application for a special exception on June 11, 2013. (R. pp. 99, 103-105) The applicant presented evidence in support of his application. At least five community residents spoke in opposition to the special exception. A private attorney, hired by City Council, also presented in opposition to the special exception.

At the conclusion of the hearing the Board voted to deny the special exception and the Board issued its written order on June 27, 2013. (R. pp. 64-5, 105) The Board’s written order stated 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 “create vehicular and pedestrian safety problems” and “impact the aesthetic character of the environs, especially in regards to the proliferation of signs” on the business. (R. p. 65)

Petitioner 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) The circuit court affirmed the Respondent’s decision and filed its order on June 4, 2014. Petitioner timely filed his appeal to the court of appeals. (R. pp. 3-11, 38) The court of appeals affirmed the circuit

court's decision. Ganotakis v. City of Columbia Bd. of Zoning Appeals, 2016-UP-153 (S.C. Ct. App. Filed March 30, 2016).¹

ARGUMENT

I. The Board's decision to deny the special exception was supported by evidence in the record and the decision was not arbitrary and capricious.

The main issue in this case is whether the Respondent properly denied Petitioner's request for a special exception to operate a liquor store. The court of appeals correctly affirmed the Board's decision to deny the special exception. The Respondent's decision to deny the special exception was supported by evidence in the record, the decision was not arbitrary and capricious, and the Board followed the proper criteria and standards in denying the request.

In zoning cases, a reviewing court's standard of review is governed by S.C. Code Ann. § 6-29-840(A) (Supp. 2015). This section provides, in part, that "[t]he findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence. . . . In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law." Id.

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

¹ In order not to be bound by Petitioner's Statement of the Case, see Rule 208(b)(2), SCACR, Respondent objects to certain portions of Petitioner's Statement of the Case. The Statement is improperly argumentative in discussing the Board hearing. Respondent also takes exception to Petitioner's statement that Petitioner never received notice or had knowledge that private counsel would appear at the hearing. While true, 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.

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. Rest. Row Assocs. v. Horry County, 335 S.C. 209, 516 S.E.2d 442 (1999).

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. 2015). Pursuant to this statute, the City of Columbia Zoning Ordinance (“City Code”) contains substantive provisions, i.e., terms and conditions, relating to the granting or denial of a special exception. 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 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.

The Board evaluated the special exception request in this case under each of the 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).

Petitioner argues that there was no credible evidence in the record to support the Board’s finding that the public interest would be adversely affected by the liquor store’s location to a school, and that there was no evidence to establish a proliferation of liquor stores in the area. Petitioner states that “neither of these two are listed in the criteria for granting special exceptions.” Respondent assumes that by “these two” Petitioner is referencing (1) the liquor store’s location to a school, and (2) the proliferation of liquor stores in the area.

Petitioner misapprehends the Board’s findings. The Board did not use locations to schools and proliferation of liquor stores as separate criteria. The Board found that the public interest would be adversely affected due to the liquor store’s proximity to a middle school and due to the proliferation of liquor stores in the area.

A liquor store is not a use by right in the applicable zoning district. The City Code requires the Board to deny a special exception request if the use would be adverse to the public interest. The City Code states that the Board must make a finding that a special exception “will not adversely affect the public interest.” City Code § 17-112(2)b.4.

Contrary to Petitioner’s assertions, there is evidence in the record to support the Board’s determination that the public interest would be adversely affected. Petitioner is essentially

arguing that the Board's conclusion regarding any adverse affect on the public interest was incorrect. However, Petitioner cannot deny the facts clearly found in the record concerning the location of the proposed liquor store and number of liquor stores in the area. Petitioner 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. (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 Board also heard evidence and considered the number of liquor stores in the area in its evaluation of public interest. The Board heard concrete 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 Petitioner'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.

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 (5) (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 to schools and proliferation of liquor stores 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. See S.C. Code Ann. § 6-29-710(A)(5) (2004).

The testimony concerning the proximity of the proposed liquor store to a school and the number of liquor stores in the area was 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. Petitioner seeks to have the courts take a different view of the evidence and make a different decision regarding the public interest 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 a court’s judgment for that of the Board. See Rest. 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). Based on the record, evidence was presented by which the Board could reasonably conclude that the special exception would adversely affect the public interest.

Petitioner 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 Petitioner 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 Petitioner'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.

Petitioner 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 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. In Wyndham, the court of appeals 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 and opinion and there is no concern about the basis of the

testimony provided to the Board. 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.

Petitioner states that there was no competent or specific evidence presented to the Board of any actual injury to properties to warrant the denial of the special exception. This testimony is not necessary in order to deny a special exception. The Board specifically found, based on the concrete facts presented, that the liquor store would adversely affect the public interest and that it would impact the aesthetic character of the environs. So long as there are facts to support these conclusions, there is no further requirement that the Board be presented with evidence concerning actual injury to property.

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 affect on the public interest, the Board evaluated the special exception application in this case under each of the above substantive rules governing special exceptions and found that the special exception would "create vehicular or pedestrian safety problems" and that it would "impact the aesthetic character of the environs,

especially in regards to the proliferation of signs”² (R. p. 65) The Board heard evidence of children walking along the sidewalks in front of the liquor store, and that a residential neighborhood is located across the four-lane road with no medians or crosswalks. One of the witnesses introduced a photograph depicting the signage and posters on the outside of the building. (R. pp. 69, 121-2) Another citizen testified about the signage and its visual effects, in addition to the photograph of the signage. (R. pp. 69, 120) 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, Petitioner admitted that he had advertisements for liquor, cigarettes, and the lottery. (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 adverse impact on the aesthetic character of the area, and pedestrian and vehicular safety concerns, certainly find support in the record. 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. Moreover, nowhere in its Petition does Petitioner challenge the Board’s finding that the special exception would impact the aesthetic character of the environs.

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

II. The court of appeals did not err in determining that Petitioner was not prejudiced by a conflict of interest where the City of Columbia City Council hired private counsel to appear at the Board hearing on Petitioner’s request for a special exception.

² 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)

Petitioner argues that there was a conflict of interest between the Board, City Council, and private counsel by the appearance at the Board hearing of a private attorney retained by City Council.³

Petitioner does not contend now, like he did to the court of appeals, that a conflict existed pursuant to Rule 1.7, RPC, Rule 407, SCACR. Petitioner's main contention now is that a conflict of interest existed where private counsel appeared to serve as both an advocate for City Council and as an advisor to the Board in an adversarial proceeding. Rule 1.8(l), RPC, Rule 407, SCACR, 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 to advocate on the particular matter. Therefore, there was clearly no conflict of interest in this matter.

Petitioner is asking this Court to first find that a conflict of interest existed, and then determine that the conflict prejudiced Petitioner. If there was no conflict of interest, there could be no prejudice arising from any conflict. Petitioner apparently argues that the conflict of interest in turn created a situation of undue influence on the Board members. Petitioner's argument of undue influence and prejudice does not stand alone – it is dependent first on a

³ Petitioner did not raise the issue of a conflict of interest in the hearing before the Board. 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, Petitioner 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).

finding of a conflict of interest. Therefore, Respondent asserts that if there was no conflict of interest, then there would be no prejudice.

Petitioner suggests that since the City Attorney's office would have had a conflict of interest by appearing at the Board hearing on behalf of City Council that a private attorney hired by the City Council would also have had a conflict of interest. Assuming that Petitioner 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,⁴ any conflict was certainly remedied by the City Council hiring outside counsel who did not represent both the interests of the City Council and the interests of the Board.

In a somewhat related argument, Petitioner asserts that the conflict of interest was not remedied because City Council violated its own ordinance by hiring private counsel to appear at the Board hearing. First of all, City Council is not a party to this appeal and Respondent asserts it would be impermissible to render a decision on a violation of an ordinance by a non-party.

In any event, City Council has not violated its ordinance by hiring private counsel to appear at the Board hearing. Petitioner cites City Code § 17-81(b) which addresses City Council's role in zoning decisions. This section states that City Council shall not hear and decide questions of interpretation and enforcement of the zoning ordinance. City Code § 17-81(b). There is no evidence in the record that the City Council itself, or by acting through outside counsel, was "hearing and deciding questions of interpretation and enforcement." City Code § 17-81(b). This section does not prohibit City Council from hiring private counsel.

⁴ Respondent does not believe that a conflict of interest necessarily 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").

Petitioner complains that the court of appeals never considered the question of whether the City Attorney could have appeared before the Board to argue against the granting of the special exception. This question was not before the court of appeals. The only question before the court of appeals was whether Petitioner was prejudiced by a conflict of interest by Council's action in hiring a private attorney to appear at the Board hearing. The court of appeals addressed this question.

It is apparent that what Petitioner is really arguing is that City Council, through private counsel, unduly influenced the outcome of this proceeding. What is also abundantly apparent in this matter is that the Board, which is the only party to this action, had no part in determining the parties appearing before it, and did not err in hearing and deciding this matter.

Since Petitioner did not raise any of these issues at the Board hearing, Petitioner is asking this Court to create a new remedy, to find that Board should have recognized a conflict of interest and that the Board should have somehow prevented the private attorney from making a presentation to the Board. There would have been no authority for the Board to have done so, and the Board did not err in failing to recognize an alleged conflict of interest.

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, and that Petitioner was not prejudiced.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be denied.

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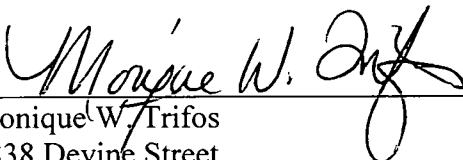
City of Columbia Board of Zoning Appeals..... Respondent.

PROOF OF SERVICE

I certify that I have served the Respondent's Return to Petition for a Writ of Certiorari and this proof of service by depositing a copy of the same in the United States Mail, postage prepaid, on July 14, 2016 at the address below:

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