

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

AUG 16 2018

SC Court of Appeals

Roger M. Young, Circuit Court Judge

Appellate Case No. 2018-000907

241-243 E. Bay Holdings, LLC,.....Appellant,

v.

The City of Charleston, The Board of Zoning Appeals-Zoning for the City of Apex Real
Property, LLC, and East Bay 7, LLC,..... Respondents.

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities.....ii

Statement of the Issues on Appeal.....1

Statement of the Case.....2

Statement of Facts.....3

Argument.....8

 I) Applicable Standard of Review.....8

 II) The Circuit Court erred when it affirmed BZA’s grant to Pearce Development of a special exception allowing them to build a hotel on their property, because Respondents’ application and presentation did not meet all of the requirements for a special exception, and, therefore, the BZA did not have the requisite evidence before it when it rendered its decision.....9

Conclusion.....12

TABLE OF AUTHORITIES

Cases

Austin v. Bd. of Zoning Appeals, 362 S.C. 29, 606 S.E.2d 209 (Ct. App. 2004) 7

Fontaine v. Peitz, 291 S.C. 536, 354 S.E.2d 565 (1987) 7, 9

Heilker v. Zoning Bd. of Appeals for City of Beaufort,
346 S.C. 401, 552 S.E.2d 42 (Ct. App. 2001)..... 7

Hodge v. Pollock, 223 S.C. 342, 75 S.E.2d 752 (1953) 8, 11

Restaurant Row Assocs. v. Horry County, 335 S.C. 209, 516 S.E.2d 442 (1999) 7

Statutes

S.C. Code Ann. § 6-29-840..... 7

City of Charleston Zoning Ordinance

Sec. 54-220 3, 6, 8

Sec. 54-923(a)(2) 3, 7

STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court err as a matter of law by affirming the BZA's grant to Pearce of a special exception for the development of a hotel on Pearce's property when there was no evidence presented to the BZA concerning the impact of an accessory use, a conference room/event space, on parking and/or traffic?

STATEMENT OF THE CASE

On August 16, 2017, Appellant 241-243 E. Bay Holdings, LLC (hereinafter “Holdings”) filed this action against Respondents appealing a final decision of the City of Charleston Board of Zoning Appeals – Zoning (hereinafter “BZA”) which approved the request of Apex Real Property, LLC and East Bay 7, LLC, now both known as Pearce Development, LLC (hereinafter “Pearce”) for a special exception to the A-1 Accommodations Overlay Zone for a 50-room hotel on property owned by Pearce located at 36 N. Market Street, 5 Guignard Street and 235 East Bay Street, which property is directly across Guignard Street from Appellants’ property located at 241-243 East Bay Street.

Because the City of Charleston’s recording apparatus at the time of the hearing on this matter before the BZA malfunctioned, there was not a transcript. By Order, dated November 20, 2017, the Circuit Court remanded the matter back to the BZA to recreate the record. On January 16, 2018, the BZA accepted affidavits for counsel for the two parties involved and discussed what they remembered of the hearing, and that constituted the recreation of the record.

The Honorable Roger Young, Circuit Court Judge, heard the appeal on April 16, 2018, and by Order, dated May 7, 2018, affirmed the decision of the BZA. On May 11, 2018, 241-243 E. Bay Holdings, LLC, served and filed a Notice of Appeal.

STATEMENT OF FACTS

Under the City of Charleston Zoning Ordinance (hereinafter “ZO”), Sec. 54-923(a)(2), the BZA has the power “to permit uses by special exception subject to the terms and conditions for the uses set forth for such uses in the zoning ordinance.”

Holdings owns property on the corner of East Bay and Guignard Streets, near the Old City Market in Charleston, SC. Pearce owns the properties located at 36 N. Market Street, 5 Guignard Street and 235 East Bay Street, which is across the street from 241-243 East Bay Street and on which Pearce intends to construct a 50-room hotel, some retail, 7400 square feet of bars, restaurants and retail space, and 4338 square feet of event space. Under the ZO, in order to be approved to build a 50-room hotel, a developer must apply for, and receive, a special exception from the BZA. In order to be entitled to this special exception, an applicant must meet ***all*** of the requirements set forth in the Zoning Ordinance, Sec. 54-220:

- a) The elimination of housing units by the proposed facility will not adversely affect the existing housing stock;
- b) The location of the facility will not significantly increase automobile traffic on streets within residential neighborhoods;
- c) The total square footage of interior and exterior floor area for restaurant and bar space in the proposed facility, including restaurant/bar patron use areas, bar areas, kitchen, storage, and bathroom facilities, shall not exceed 12 percent of the total interior, conditioned floor area in the facility, except that each facility shall be permitted to exempt from the calculation of total restaurant floor area one interior, ground floor restaurant tenant space if the total tenant space does not exceed 2000 square feet, the restaurant tenant does not serve alcoholic beverages, and the exempt restaurant tenant space is clearly labeled with these restrictions on the floor plans submitted with the application for this zoning special exception;
- d) The proposed use is otherwise in character with the immediate neighborhood;
- e) The location and design of the proposed facility will facilitate pedestrian activity and encourage transit system usage within the peninsula;
- f) ***In making these findings, the Board of Zoning Appeals shall consider the following information to be provided by the applicant in site plans, floor plans, building elevations, and a detailed written assessment report to be submitted with the application:***

...

3) The number of vehicle trips generated by the facility and the traffic circulation pattern serving the facility and efforts made to minimize traffic impacts;

...

7) The accessory uses proposed for the facility in terms of the size, impact on parking, and impact on traffic generation

... [Emphasis added.]

On December 20, 2016, Pearce presented to the BZA at a hearing its first request for a special exception to allow it to develop a 50-room hotel on its property. Holdings and other interested parties opposed the request due to traffic and parking concerns. Because of concerns over traffic and parking, the BZA deferred Pearce's request to allow Pearce to address their concerns. On January 17, 2017, Pearce appeared again before the BZA to renew its request for a special exception. Again, Holdings and other interested parties opposed the request due to the same traffic and parking concerns, and, again, the BZA deferred the request seeking more information regarding the traffic information presented by Pearce.

On June 19, 2017, Pearce submitted a revised application to the BZA. As set forth above, the ZO requires the submission of a "detailed written assessment report" with the application and that report must address "the accessory uses proposed for the facility in terms of the size, impact on parking, and impact on traffic generation." The submitted "detailed written assessment report" did not even mention the conference/meeting/event space accessory use, so it did not have any discussion of it "in terms of the size, impact on parking and impact on traffic generation," as required by the ZO. In addition, the Traffic Impact Analysis prepared on behalf of, and presented to the BZA by, Pearce made no mention of the conference/meeting/event space accessory use and, instead, asserts that Pearce had removed more than 5000 square feet of restaurant space, which will lower the traffic generated (from 8400 square feet in prior application to 3229 square feet in the June 2017 application) (R. pp. 46, 290), without any

reference to, or even mention of, the new use (4438 square feet of conference/meeting/event space) and its impact on traffic and parking. In addition, the Traffic Impact Analysis failed to account for the bars and outdoor restaurant which are also accessory uses. Instead, it only considered the 3229 square feet of “specialty retail” located on the first floor of 36 N. Market Street.

At the July 18, 2017 BZA hearing, the City Zoning Administrator, Lee Batchelder, noted that “[t]he second floor of the 36 North Market building is shown as conference space.” (R. p. 387). He made no other mention of the new accessory use or its impact on parking or traffic. Mr. James Wilson, Pearce’s attorney, presented the application.¹ Mr. Wilson stated in his affidavit, part of the recreated record, that “[t]he new plans made two major changes: ... (ii) the total commercial space was reduced from the current approximately 12,000 square feet to approximately 7000 square feet (a reduction of 5000 square feet).” (R. p. 435). In his affidavit and at the hearing, Mr. Wilson failed to take into account the 4338 square feet of conference/meeting/event space in his numbers. He also stated in his affidavit that Pearce’s architect, Eddie Bello, reviewed the plans for the BZA and described “the second floor conference/meeting room in the historic building on Market Street, which conference/meeting room can be accessed by a second floor walkway from the hotel rooms and lobby.” (R. p. 436). The architect did mention the new accessory use when he went over the revised floor plans, but he did not address traffic or parking impacts of that use.

In the Paylor Affidavit, Ms. Paylor described a question asked by one of the BZA members to Mr. Wilson as to whether the parking garage would be limited to use by hotel guests

¹ Because the City’s recording apparatus malfunctioned, there is not a transcript of what any presenter said other than Mr. Batchelder, and the BZA had to recreate the record based on affidavits given by Mr. Wilson and Holdings’ attorney, Alice Paylor.

or be open to the public, and he responded that it would be limited to hotel guests only. (R. pp. 442-443, 446). Holdings' objections presented to the BZA included "applicant had failed to address the parking needs and the traffic impact of the 4439 square feet conference center, as well as bar facilities and restaurants, all of which [Holdings] anticipated would be used by members of the public and not only by hotel guests, adding more traffic and parking needs." (R. p. 443). Ms. Paylor further stated to the BZA that Pearce had failed to comply with ZO Sec. 54-220.f(7), which required that Pearce's application provide a "detailed written analysis of the accessory uses proposed for the facility in terms of the size, impact on parking and impact on traffic generation," because Pearce had failed to address the parking requirements or impact on traffic of the conference center, the outdoor restaurant and bars, including no description of the maximum occupancy or even proposed use, and the traffic study failed to address these accessory uses at all. Ms. Paylor recalled the discussion of the BZA regarding this application as to the traffic issues that "impacted the Ansonborough neighborhood but never mentioned the impact of the accessory uses, bars, restaurants and conference center on traffic or parking other than to require that the patrons of the conference center could not enter the facility off of Market Street." (R. p. 445).

Over the objections of Holdings, the BZA granted a special exception to allow Pearce to develop a 50-room hotel on the property, as set forth in the submitted plans. Holdings filed a Petition in the Court of Common Pleas appealing this decision. After a hearing on April 16, 2018, Judge Roger Young issued an Order, dated May 7, 2018, affirming the BZA's decision.

Holdings timely filed its Notice of Appeal on May 11, 2018.

ARGUMENT

I. Applicable Standard of Review

Under S.C. Code Ann. § 6-29-840(A) (Supp. 2016), this Court applies the same standard of review as the lower court, as follows: the findings of fact by the Board shall be treated in the same manner as findings of fact by a jury, and the court may not take additional evidence.” Heilker v. Zoning Bd. of Appeals for City of Beaufort, 346 S.C. 401, 405, 552 S.E.2d 42, 44 (Ct. App. 2001). “In reviewing the questions presented by the appeal, the court shall determine only whether the decision of the Board is correct as a matter of law.” Id. Furthermore, “[a] court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision.” Austin v. Bd. of Zoning Appeals, 362 S.C. 29, 33, 606 S.E.2d 209, 211 (Ct. App. 2004) (quoting Restaurant Row Assocs. v. Horry County, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999)). “However, a decision of a municipal zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion.” Id. An abuse of discretion occurs when a decision is based upon an error of law or, when based upon factual conclusions, is without evidentiary support. Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987).

II. The Circuit Court erred when it affirmed BZA’s grant to Pearce of the special exception, because Pearce’s application did not meet the special exception terms and conditions for a hotel in that location in that it provided no information on the impact of its accessory uses -- event space, restaurants and bars -- on traffic and parking to the BZA.

Pursuant to ZO Section 54-923(a)(2), the BZA has the power “to permit uses by special exception subject to the terms and conditions for the uses set forth for such uses in the zoning ordinance.” In exercising its discretion, the BZA “must abide by and comply with the standard

prescribed by the local ordinance and zoning statutes.” Hodge v. Pollock, 223 S.C. 342, 348, 75 S.E.2d 752, 755 (1953).

Pearce Development presented its application for a special exception to the BZA on three (3) different occasions, the last one being July 18, 2017. At that meeting, Pearce’s plan had been changed in several ways to address the concerns of the BZA expressed at its January 2017 meeting, *i.e.*, the impact of traffic on neighboring residential areas. In addition to those changes, Pearce added an additional accessory use, not previously set forth in its plans: a conference center or event space on the second floor of the building located at 36 N. Market Street. On the first floor of that building were three retail spaces that totaled 3229 square feet. In the written assessment required by subsection (f) of Sec. 54-220 of the Zoning Ordinance, Pearce never mentioned the conference center / event space. (R. pp. 272-276). Indeed, in its written assessment covering subparagraph 7 (“the accessory uses proposed for the facility in terms of size, impact on parking, and impact on traffic generation”), there is no mention of a conference center / event space and, of course, no mention of the size of that space, its impact on parking or its impact on traffic generation, all of which is expressly required by Sec. 54-220(f)(7). (R. p. 274).

The only information regarding the impact of traffic was set forth in the Traffic Impact Analysis prepared by Bihl Engineering for Pearce. That analysis does not mention any accessory uses other than 3229 square feet of “specialty retail” on the first floor of 36 N. Market Street. (R. pp. 286-337) (only mention of accessory uses on pages 290 and 292). On page 1 of the Traffic Impact Analysis, Bihl stated on two separate occasions: “The proposed development includes a 50-room hotel and 3,229 sf of retail or restaurant (located on Market Street).” (R. p. 290). As evidenced by Table 1 of the report, Bihl’s analysis is based on a 50-room hotel and

only 3,229 sf of retail or restaurant space. (R. p. 292). It makes no mention and does not analyze the outdoor restaurant, the two (2) bars in the hotel or the 4338 square feet of conference center / event space. It presented no evidence from which the BZA could consider the impact of these accessory uses on traffic and parking. (R. pp. 286-337).

The Circuit Court recognized that Holdings presented the issue of “whether there was evidence in the record that Pearce provided information from which the BZA could consider the impact of the planned conference/meeting room on parking and traffic.” Circuit Order, pp. 2-3. The Circuit Court erred in finding that the Traffic Impact Analysis took into consideration the impact of the conference/meeting room when it clearly did not. Circuit Court Order, p. 2. The Order correctly states that the BZA conditioned its approval on moving the entrance to the event space off of Market Street. Pearce showed an entrance to this space off of Market Street, so the BZA had information presented to it on that issue, but there was no other evidence presented at the hearing about the impact on traffic or parking, and the Traffic Impact Analysis clearly only included the three specialty retail spaces on the first floor of 36 N. Market Street. The Court relied on the fact that the BZA was “aware of the conference facility” to state that the BZA considered it in conjunction with the required factors under the Zoning Ordinance. However, the issue is whether the BZA had the evidence before it so that it could consider the required factors of impact on parking and traffic. See Fontaine, 291 S.C. at 538, 354 S.E.2d at 566 (an abuse of discretion occurs when a zoning board’s factual conclusions are without evidentiary support).

In its Order affirming the BZA’s grant of a special exception to Pearce, the Circuit Court ignored the express requirement of the ordinance and, instead, stated that “there was evidence before the BZA-Z from which it could have appropriately concluded that the accessory uses for restaurant and conference/meeting space would have a negligible impact, if any, on parking in

the area surrounding the proposed hotel.” Circuit Court Order, pp. 5-6. There was no evidence in Pearce’s Traffic Impact Analysis or in the Board’s discussion of traffic or parking that any consideration was given to the conference center / event space, other than requiring that it not have an entrance on N. Market Street or to the outside restaurant and the bars in the hotel. (R. pp. 286-337, 409-473).

Pearce’s plans submitted to the BZA showed the “conference/meeting room” to be 4438 square feet on a site plan of the second floor. (R. p. 281). That is the only mention of this space in the entire written submittal to the BZA. (R. pp. 272-337). In the Affidavit of James Wilson, Pearce’s lawyer who presented at the BZA, he does not mention the conference/meeting room except to say that the architect described it in his presentation. In fact, the architect did describe that there was 4438 square feet designated as a conference/meeting room, and that was the sum total of the presentation. There was no discussion at the meeting of the impact of this space, and there was no way for the BZA to consider its impact because nothing was presented to them concerning it. In addition, there was no discussion of the impact of the outdoor restaurant or the two bars designated on the plans.

In the Affidavit of Alice Paylor, Holdings’ attorney, she stated that the BZA never mentioned in its discussion “the impact of the bars, restaurants or the conference center on traffic or parking other than to require that the patrons of the conference center could not enter the facility off of Market Street.” The two affidavits are not in conflict with regard to this statement.

There was no evidence in the record before the Circuit Court that the BZA received any evidence, much less the required written assessment, concerning the impact of the conference / event space, the outdoor restaurant and the two (2) bars, or that it considered their impact on, parking or traffic. “In exercising its discretion, the [BZA] is not left free to make any

determination whatever that appeals to its sense of justice. It must abide by and comply with the standard prescribed by the local ordinance and zoning statutes.” Hodge, supra.

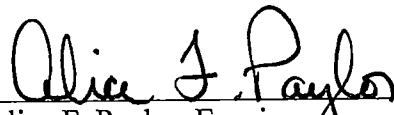
This Court should reverse the Circuit Court and the BZA with regard to the grant of the special exception to Pearce.

CONCLUSION

As set forth hereinabove, the Circuit Court’s Order affirming the BZA’s decision to grant a special exception to Pearce for a 50-room hotel was arbitrary, capricious, not reasonably related to a lawful purpose, without evidentiary support, and an abuse of discretion and should be reversed.

Respectfully submitted,

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August 14, 2018
Charleston, South Carolina

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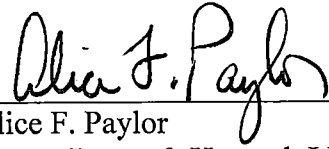
PROOF OF SERVICE

I do hereby certify that on August 14, 2018, I have served all counsel in this action with a copy of the documents herein below specified by mailing a copy of the same by United States mail, postage prepaid, to the following address:

Documents: **Appellant’s Initial Brief and Designation of Matter**

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VIA UNITED STATES MAIL

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: 241-243 E. Bay Holdings, LLC v. The City of Charleston, et al.
Appellate Case No.: 2018-000907

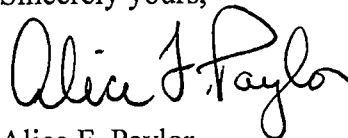
Dear Ms. Kitchings:

Enclosed please find an original and one (1) copy of the Appellant's Initial Brief, Designation of Matter and Proof of Service in connection with the above-referenced matter. Please file the original with the Court and return a clocked copy of the documents in the enclosed self-addressed, stamped envelope.

Thank you for your consideration of this request.

With kind regards, I am

Sincerely yours,



Alice F. Paylor

AFP/amw
Enclosures

cc: Daniel S. McQueeney, Jr., Esquire
Charles J. Baker, III, Esquire



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