

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No. 2017-CP-10-4212

241-243 E. Bay Holdings, LLC,

Appellant,

v.

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

Respondents.

INITIAL BRIEF OF RESPONDENTS THE CITY OF CHARLESTON AND THE CITY OF
CHARLESTON BOARD OF ZONING APPEALS-ZONING

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CITY ORDINANCES

§ 54-220*Passim*

STATEMENT OF ISSUES ON APPEAL

WAS THE CIRCUIT COURT CORRECT IN AFFIRMING THE BZA'S GRANT OF A SPECIAL EXCEPTION TO RESPONDENT PEARCE DEVELOPMENT, LLC FOR A 50-ROOM HOTEL PROJECT WHEN THE RECORD ESTABLISHES THAT THE BZA CONSIDERED THE IMPACTS OF THE PROPOSED ACCESSORY USES OF A CONFERENCE/MEETING ROOM, RESTAURANT/BAR SPACES, AND RETAIL SPACE ON PARKING AND TRAFFIC CONGESTION IN THE EXISTING RESIDENTIAL NEIGHBORHOOD?

STATEMENT OF THE CASE

Respondent Pearce Development, LLC (“Pearce”), formerly known as Apex Real Property, LLC, owns three contiguous lots of land located at 5 Guignard Street, 36 North Market Street, and 235 East Bay Street, in downtown Charleston.¹ (R. pp. 342-43, p. 405). Appellant 241-243 E. Bay Holdings, LLC (“Appellant”) owns property lying on the northwest corner of Guignard Street and East Bay Street. (R. p. 343). Appellant’s property is separated from 5 Guignard Street by the right-of-way for Guignard Street. (R. p. 343).

Pearce’s properties are zoned General Business (“GB”) and lie within the Accommodations (A) overlay zone, which permits accommodations uses with up to 50 hotel rooms if the City of Charleston Board of Zoning Appeals-Zoning (the “BZA” or “Board”) grants a special exception under section 54-220 of the City of Charleston Code of Ordinances (“54-220”). (R. p. 343, p. 382, lines 12-19, pp. 474-476).

Prior to the present appeal, the lot at 235 East Bay Street contained 6,465 square feet of available restaurant space, and the lot at 36 North Market Street contained 5,613 square feet of available restaurant space. (R. p. 10). Pearce also received a previous special exception under 54-220 to construct 36 total hotel rooms on the lots at 5 Guignard Street and 36 North Market Street. (R. p. 380, lines 16-25).

Pearce now desires a special exception under 54-220 to develop the properties into a hotel with 50 total rooms, to include approximately 7,400 square feet of restaurant, retail, and bar space. (R. p. 272). The proposal includes approximately 4,439 square feet on the second floor of the building on 36 North Market Street, designated for a “conference/meeting room.” (R. p. 279-281).

¹ Apex Properties, LLC changed its name to Pearce Development, LLC. (R. p. 405). East Bay 7, LLC is the former owner of 235 East Bay Street, which is now owned by Pearce. (R. p. 405). East Bay 7, LLC is no longer an interested party in this matter. (R. p. 405).

As a result, on November 11, 2016, Pearce filed its application for a special exception to construct a 50-room hotel on the properties. (R. pp. 1-8). The original application included a request for 8,384 square feet of restaurant space. (R. p. 11). The BZA deferred the application twice. (R. pp. 148, 265). On June 19, 2017, Pearce submitted a revised application, which is the subject of the current appeal. (R. pp. 272-285). The revised site plan showed the 50-room hotel, retail, restaurant, and bar space, and the conference/meeting room. (R. pp. 279-281). On July 18, 2017, the BZA granted a special exception to Pearce based on the revised site plan, subject to the following conditions: (1) that there be no access to the conference/meeting room from Market Street; and (2) that all traffic leaving the hotel be required to turn right onto Guignard Street. (R. p. 397).

Pursuant to section 6-29-820 of the South Carolina Code, on August 16, 2017, Appellant appealed the BZA's decision, arguing, *inter alia*, that Pearce's traffic study failed to consider the impact of the conference/meeting room, restaurant, and bars as part of the project. (Petition). Due to a transcription error, by consent of all parties, the matter was remanded to the BZA to reconstruct the record. (R. pp. 405-408). On January 16, 2018, the BZA held a hearing, during which it reconstructed the record. (R. p. 448).

On April 16, 2018, the circuit court heard Appellant's appeal based on the reconstructed record. (Hrg. Tr. p. 1). On May 7, 2018, the circuit court entered an order affirming the BZA's decision, concluding that "the BZA carefully considered the issues and did not act in an arbitrary or capricious manner or abuse its discretion in rendering the decision." (Order filed 5/7/2018, p. 7). In its order, the circuit court outlined the numerous instances where the BZA received and considered evidence with respect to the parking and traffic impacts of the conference/meeting room and other accessory uses to the hotel. (Order filed 5/7/2018, pp. 3-5).

On May 9, 2018, Appellant received written notice of entry of the circuit court’s order. (Notice of Appeal.). Appellant served its notice of appeal of the circuit court’s decision on May 11, 2018. (Notice of Appeal).

STANDARD OF REVIEW

On appeal from the decision of a board of zoning appeals, “[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.” S.C. Code Ann. § 6-29-840(A). “The factual findings of the Board must be affirmed by the circuit court if there is *any* evidence to support them and they are not influenced by an error of law.” Fairfield Ocean Ridge, Inc. v. Edisto Beach, 294 S.C. 475, 479-80, 366 S.E.2d 15, 18 (Ct. App. 1988) (emphasis in Fairfield). “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.” Austin v. Bd. of Zoning Appeals, 362 S.C. 29, 33, 606 S.E.2d 209, 211 (Ct. App. 2004).

ARGUMENT

THE CIRCUIT COURT CORRECTLY AFFIRMED THE BZA’S DECISION TO GRANT PEARCE A SPECIAL EXCEPTION FOR A 50-ROOM HOTEL PROJECT BECAUSE THE RECORD ESTABLISHES THAT THE BZA CONSIDERED THE IMPACTS OF THE PROPOSED ACCESSORY USES OF A CONFERENCE/MEETING ROOM, RESTAURANT/BAR SPACES, AND RETAIL SPACE ON PARKING AND TRAFFIC CONGESTION IN THE EXISTING RESIDENTIAL NEIGHBORHOOD.

On appeal, Appellant asserts that the decision of the BZA should be reversed because Pearce failed to present evidence addressing the parking and traffic impacts of the proposed accessory uses to the hotel—the conference/meeting room, restaurant/bar spaces, and retail space.² The record reveals otherwise.

² Appellant’s “Statement of Issues on Appeal” alleges that “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[.]” (App.’s Br. p. 1). However, Appellant’s “Argument” asserts that Pearce “provided no

The stated purpose of 54-220 is to protect residential neighborhoods. The record shows that Pearce extensively addressed the impact of the entire proposed development on parking and traffic on the only nearby residential neighborhood—Historic Ansonborough—during three (3) separate BZA hearings. The record shows the BZA thoroughly vetted these impacts, and, in keeping with the stated purpose of 54-220, ultimately conditioned Pearce’s special exception such that these impacts would be directed away from Historic Ansonborough.

Nevertheless, Appellant suggests that Pearce must eliminate all possible parking and traffic impacts associated with the development, regardless of any effect on residential neighborhoods. This is not the standard, as both the BZA and circuit court recognized.

A. The BZA correctly applied 54-220 to protect residential neighborhoods.

“The A Overlay Zone is intended to identify those areas within the City limits where accommodations uses are allowed.” § 54-220.a (R. p. 474). With limited exceptions, not relevant here, accommodation uses are prohibited except within the A Overlay Zone, but only when the applicant obtains a special exception from the BZA. § 54-220.a (R. p. 474).

“It is well settled that when interpreting an ordinance, legislative intent must prevail if it can be reasonably discovered in the language used.” Charleston Cty. Parks & Rec. Comm’n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995). “An ordinance must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.” Id. at 68, 459 S.E.2d at 843.

The express legislative intent behind the A Overlay Zone is to protect residential neighborhoods: “The City places a high value on the preservation of the character of its residential

information on the impact of its accessory uses—event space, restaurants and bars—on traffic and parking to the BZA.” (App.’s Br., p. 7). Respondents City of Charleston and the BZA (collectively, the “City”) address each of these issues in this argument.

neighborhoods.” § 54-220.a (R. p. 474). “Potential negative impacts *affecting residential neighborhoods* shall be avoided or minimized to the greatest extent possible.” § 54-220.a (R. p. 474) (emphasis added).

In this respect, section 54-220.b.1 provides, in pertinent part, that the BZA “may permit accommodation uses as an exception where it finds that:

- (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 2,000 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; and
- (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;
 -
 - (6) *the proximity of residential neighborhoods to the facility*;
 - (7) *the accessory uses proposed for the facility in terms of the size, impact on parking, and impact on traffic generation*;
 -

(R. pp. 474-76) (emphasis added).

Here, the BZA deferred Pearce’s application twice, both times *demanding* that the applicant negate, to the maximum extent feasible, any adverse traffic impacts on Historic

Ansonborough. (R. p. 142, line 25-p. 143, line 12, p. 261, line 16-p. 263, line 7). These demands were capped off by a condition requiring traffic exiting the hotel to turn right onto Guignard Street, forcing traffic away from the neighborhood. (R. p. 397).

B. The record establishes that the BZA considered potential parking and traffic impacts from the accessory uses.

Appellant contends that Pearce failed to include any information in its written assessment addressing the impact of the conference/meeting room on traffic and parking. In doing so, Appellant attempts to divorce Pearce's traffic impact analysis and written assessment from the remainder of Pearce's application and the other evidence presented to the BZA. This contention runs contrary to the plain language of 54-220.b.1(f), which requires that the site plans, floor plans, building elevations, *and* detailed written assessment report should be considered together. See § 54-220.b.1(f) (R. p. 474).

As directed by 54-220.b.1(f), Pearce submitted, and the BZA considered, the written assessment, together with the site plan, floor plans, and building elevations. (R. pp. 272-337). These documents, taken together, establish that the BZA fully considered the potential parking and traffic impacts of the proposed development—including the accessory uses—on Historic Ansonborough.

For example, Pearce's written assessment specifically addresses each of the factors set forth in section 54-220, including extensive discussion of parking and traffic impacts. (R. p. 272, ¶ b) (explaining project is in a commercial/business district with easy access to arterial streets; access to property will not require traversing any residential neighborhoods; and there should be no material increase in automobile traffic on streets within residential neighborhoods); (R. p. 273, ¶ e) (public will have excellent pedestrian access; property located on CARTA bus route; project includes bicycle storage); (R. p. 273, ¶ f.3) (automobile access and parking arrangements have

been designed to minimize traffic impacts; aggregate vehicle trips will be lower than the vehicle trips generated by the existing approved uses³; (R. p.273, ¶ f.4) (main entrance and parking entrance designed to be closest to arterial roads); (R. p.273, ¶ f.7) (project reduces total restaurant/bar use by approximately 5,000 square feet; provides parking spaces in excess of the required minimum; accessory uses expected to cater primarily to pedestrians and hotel guests; not expected to materially impact parking or traffic; project should reduce existing parking and traffic impacts compared to uses currently permitted).

With respect to parking, Pearce explained: “The property has parking spaces in excess of the required number and significantly more than would be expected to be used by hotel guests, leaving additional spaces available for some employees.” (R. p. 275, ¶ f.13). “The convenient location of CARTA bus service should encourage more employees to use public transportation, and bicycle storage will be provided to hotel employees to encourage bicycle use.” (R. p. 275, ¶ f.13). Each of these points was also addressed by James M. Wilson, Pearce’s attorney, at the BZA hearing on July 18, 2017. (R. pp. 437-439, ¶ 14).

With respect to the site plans, Eddie Bello, the architect for the project, went through each floor of the revised plans at the BZA hearing, describing, among other things, “the second floor conference/meeting room in the historic building on Market Street, which conference/meeting room can be accessed from a second floor walkway from the hotel rooms and lobby.” (R. p. 436, ¶ 12). Pearce also presented traffic data addressing the traffic trip counts on Anson Street compared with other streets in the area, concluding: “Anson Street would not be materially affected, and the Applicant’s proposed project would certainly not significantly increase traffic on Anson Street.”

³ See Bannum, Inc. v. City of Columbia, 335 S.C. 202, 205 n.4, 516 S.E.2d 439, 440 (1999) (recognizing board of zoning appeals should have compared traffic impact of project to traffic impact from permitted uses in addressing special exception request).

(R. p. 440, ¶15.c). Cf. Bannum, Inc. v. City of Columbia, 335 S.C. 202, 205 n.4, 516 S.E.2d 439, 440 (1999) (emphasizing that a board of zoning appeals commits error in refusing to consider the affidavit of the applicant’s president and attorney “to the effect that the proposed use should substantially lessen traffic.”).

In his affidavit, Wilson explains: “Ms. [Alice] Paylor [Appellant’s attorney] raised an objection about the 2nd floor conference/meeting room as shown in the revised plans and what impact it might have.” (R. p.440, ¶ 16). Wilson continued: “The Board asked questions regarding the objections and also discussed among themselves various concerns.” (R. p.440, ¶ 17). Paylor’s own affidavit provides: “The main concerns that I presented were the large bar facilities and the newly added conference center, which had not been addressed at all in the written submission of the applicant.” (R. p.443, ¶ 8). Paylor concluded: “The [BZA] discussed the traffic issues as they impacted the Ansonborough neighborhood, but never mentioned the impact of bars, restaurants or the conference room center on traffic or parking *other than to require that patrons of the conference center could not access the facility off of Market Street.*” (R. p.443, ¶ 14) (emphasis added). Notably, the BZA also imposed a condition that all traffic exiting the hotel turn right onto Guignard Street, directing such traffic away from Historic Ansonborough. (R. p. 397).

As the BZA’s chairman, Leonard Krawcheck explained during the hearing to reconstruct the record:

I recall Mr. Wilson arguing and making a case that the prongs of the test that are set out in—in his affidavit beginning in the Wilson affidavit on page 3, Item 13, that are listed as A through E, and then the specific criteria that continues on page 4 in Numbers 1, 2, and 3 later on down through Item 18, I—I remember that—that those were [w]hat I would call a slam dunk. That those were things that clearly had been met by the application, that the only real issue was the same issue that had been giving the Board a hard time in the previous two hearings; and that was the traffic on—going through the residential neighborhood in Ansonborough.

(R. pp. 459, line 20-460, line 9). This statement tracks the stated intent behind 54-220, which is to protect residential neighborhoods.

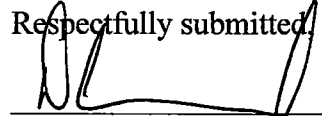
There is no question that the BZA considered the impacts on parking and traffic from the proposed development, including the accessory uses. After considering such impacts, the BZA weighed all the evidence presented and decided to grant the special exception, subject to two conditions intended to minimize impacts on Historic Ansonborough. Appellant respectfully misreads 54-220 to the extent Appellant contends the BZA cannot grant a special exception unless an applicant eliminates all possible adverse impacts, especially impacts outside of residential neighborhoods.

The BZA's decision to grant the special exception is supported by the record evidence. Therefore, the circuit court applied the proper standard of review in deferring to the BZA's findings that the special exception should be granted.

CONCLUSION

Based on the foregoing, the circuit court's decision should be affirmed.

Respectfully submitted,


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Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
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Respondents.

PROOF OF SERVICE

I certify that I have served the Initial Brief and Designation of Matter of Respondents The City of Charleston and The City of Charleston Board of Zoning Appeals-Zoning on the remaining parties to this appeal, by depositing a copy of same in the United States Mail, postage prepaid, on October 1, 2018, addressed to their attorneys of record, as follows:

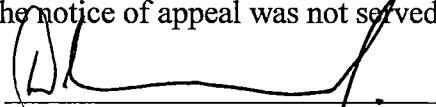
1. On Appellant 241-243 E. Bay Holdings, LLC, to its attorney of record, as follows:

Ms. Alice F. Paylor, Esquire
Rosen, Rosen & Hagood, LLC
Post Office Box 893
Charleston, SC 29402

2. On Respondent Apex Real Property, LLC, now known as Pearce Development, LLC, to its attorney of record, as follows:

Mr. Charles J. Baker, III, Esquire
Womble Bond Dickinson (US) LLP
Post Office Box 999
Charleston, SC 29402

Although East Bay 7, LLC, is listed as a respondent, it is not a party to this appeal. Prior to the appeal, on November 20, 2017, the circuit court entered a consent order recognizing, among other things, that East Bay 7, LLC, a former owner of one of the properties involved in this appeal, had conveyed its interest to Respondent Apex Real Property, LLC, now known as Pearce Development, LLC. As a result, the circuit court ruled East Bay 7, LLC “is no longer an interested party in this matter.” Consequently, the notice of appeal was not served on East Bay 7, LLC.



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Charleston, South Carolina



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City of Charleston

RE: 241-243 E. Bay Holdings, LLC v. The City of Charleston
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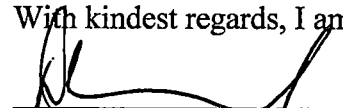
Dear Ms. Kitchings:

Please be advised that I represent Respondents City of Charleston and the City of Charleston Board of Zoning Appeals-Zoning (collectively, the "City Respondents") in the above-captioned appeal.

Enclosed for filing, please find a copy of the City Respondents' Initial Brief and Designation of Matter, along with a Proof of Service of same on all other counsel of record.

Your courtesies and consideration of this matter are greatly appreciated.

With kindest regards, I am,


Daniel S. ("Chip") McQueeney, Jr.
S.C. Bar No. 06802

c: Alice F. Paylor, Esq. (Counsel for Appellant)
Charles J. Baker, III, Esq. (Counsel for Respondents)

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