

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Appellate Case No. 2018-000907

RECEIVED

OCT 12 2018

SC Court of Appeals

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

v.

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

INITIAL REPLY BRIEF OF APPELLANT

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Attorney for Appellant

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ARGUMENT

I. RESPONDENT’S WRITTEN SUBMISSION AND OTHER EVIDENCE PRESENTED TO THE BZA DID NOT SET FORTH THE REQUISITE EVIDENCE RELATIVE TO THE IMPACT OF THE ACCESSORY USE -- CONFERENCE CENTER/EVENT SPACE -- ON TRAFFIC AND PARKING SO RESPONDENT DID NOT COMPLY WITH THE REQUIREMENTS TO OBTAIN A SPECIAL EXCEPTION.

City of Charleston Zoning Ordinance, Sec. 54-220, requires that an applicant for a special exception submit to the BZA for its consideration the following information: “... (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 ...” Holdings does not take the position that Pearce failed to address the impacts of the proposed hotel’s retail and restaurant accessory uses nor does it take the position that Pearce did not provide information concerning the size of the conference center/event space. However, there is equally no question that Respondent Pearce did not provide *any* information with regard to the number of vehicle trips generated by the conference center/event space and its impacts on parking and traffic generation. For these reasons alone, the BZA’s decision must be reversed and remanded.

In its brief, Respondent Pearce initially states, without any evidence supporting the assertion or why it is relevant, that “[b]oth event spaces and restaurants fall under the same category of permitted uses, known as Eating and Drinking Places, in the City of Charleston Zoning Ordinance, Article 2, Part 3 – Table of Permitted Uses.” At the time of the approval of the Special Exception for Pearce, there was no permitted use, known as Eating and Drinking Places, as the Zoning Code was amended to change the designation of “restaurants” to “drinking and eating places” effective December 11, 2017, after the Special Exception was approved in July of 2017. City of Charleston Ordinance No. 2017-144. Even if the ordinance had been in effect, an “Eating

and Drinking Place” is defined as “sit down establishments serving food and beverage,” which is not a conference center/event space. The City of Charleston Zoning Ordinance does not ever use the words “conference center” or “event space.” The closest description in the Zoning Ordinance to the use of “conference center” or “event space” is “place of public assembly auditorium, stadium, community center, theater,” which requires 1 off-street parking space per 6 seats or patrons (based on maximum occupancy...). Clearly the impact on parking of an event space that may hold up to 180 people for weddings and corporate events should have been considered separate and apart from the other proposed accessory uses – retail, restaurants and bars. See Affidavit of Alice Paylor, dated April 9, 2018, and exhibit thereto.

Although both Respondents’ Briefs discuss the two meetings prior to Pearce’s change of plans to add the conference center/event space, there was no evidence presented at either of those meetings about the number of trips generated or the impact on parking and traffic of a conference center/event space that was not part of the plan. The only meeting of any relevance is the July 18, 2017 meeting, for which there is no transcript. However, the affidavits submitted by the parties make no reference to any evidence addressing the number of trips generated or the impact on parking and traffic of the newly proposed conference center/event space. In fact, Holdings’ lawyer objected to the special exception because there was no information from which the BZA could consider the impact of the new use on traffic and parking, other than its location on the site plan. Respondent Pearce concedes this point in its brief, on pages 9 -10.

Respondent Pearce’s brief refers to the Record, p. 274, para. 7, which is the paragraph of Pearce’s “detailed written assessment” to the BZA that purported to address the size and impact on parking and traffic of Pearce’s accessory uses. The only accessory uses mentioned in that paragraph are “retail and restaurant.” Additionally, the paragraph fails to include the square

footage attributed to the conference center/event space when describing the “accessory uses.” There is absolutely no mention that pedestrians will be the primary persons to use the convention center/event space, and that is not credible when there may be 180 persons attending an event there.

Respondent Pearce’s Brief further references the traffic study, dated June 2017, presented to the BZA as evidence of the trips generated by *all of the accessory uses*. However, the traffic study states that the only accessory uses are “3,229 sf of retail or restaurant...” (R., p. 290) There is no mention of the additional 4338 square feet of conference center/event space that was in the revised plan under consideration by the BZA. The traffic study was performed without any consideration of the number of trips generated by the conference center/event space or its impact on traffic and parking. It shows the trips to be generated from the proposed uses of 50 hotel rooms and “3,229 sf specialty retail,” with no mention of the 4,338 square feet of conference center/event space. (R., p. 292) The traffic study did not consider the conference center/event space in any way by its express terms. The only accessory uses contemplated therein was 3,229 square feet of restaurant and retail space.

Pearce’s Brief, at page 10, asserts that “[t]he only parking requirement under the zoning ordinance is that there are two spaces for every three rooms, which for a 50-room hotel means 34 spaces.” However, the City of Charleston Zoning Ordinance, Sec. 54-317 provides: “The total parking requirement for mixed uses shall be the sum of the requirement for each use, except that ‘shopping center’ developments shall be exempt from this requirement. Parking spaces required for one use shall not be used to satisfy the parking requirement for another use with the exception of churches, synagogues or other places of worship.” There is no provision of the Code that allows hotels to be excepted from this provision.

As set forth hereinabove, Respondent Pearce failed to present the requisite information of motor vehicle trips to be generated from the conference center/event space use as well as any information on the impact of the proposed conference center/event space on traffic and parking as required by the Zoning Ordinance. Contrary to the City's position in its brief, Appellant Hanlan is not arguing that a special exception may not be granted unless "the applicant eliminates all possible adverse impacts, especially impacts outside of residential neighborhoods." City Brief, p. 10. Instead, Appellant's argument is that Pearce failed to provide the information required by the ordinance prior to the granting of a special exception. In this matter, Pearce failed to provide the required information in any form, written or testimony.¹ There was no competent, substantial and material evidence relative to the impacts of the conference center/event space, so the BZA should not have granted the special exception. See *Wyndham Enterprises, LLC v. City of North Augusta*, 401 S.C. 144, 151, 735 S.E.2d 659, 663 (2012). Therefore, the Circuit Court's decision to affirm the BZA must be reversed.

II. APPELLANT'S PETITION TO THE CIRCUIT COURT DID ADDRESS THE FAILURE OF RESPONDENT TO PRESENT THE REQUISITE INFORMATION ON PARKING AND TRAFFIC.

The Petition filed in the Circuit Court stated as follows with regard to the parking and traffic impacts of the proposed development:

11. On July 19, 2017, the BZA again considered [Pearce's] revised request for a special exception.

12. Petitioner's property ... will be adversely affected by the hotel proposed in the application as a result of increased traffic on Guignard Street, increased congestion on Guignard Street, increased parking violators on Petitioner's property, increased noise and other damaging effects including the diminution of the value of its real property.

¹ The City cites the case of *Bannum, Inc. v. City of Columbia*, 335 S.C. 202, 205 n. 4, 516 S.E.2d 439, 440 (1990), as support for its argument; however, that case clearly holds that a BZA must grant a special exception if the required evidence is presented. In this matter, no evidence was presented concerning the impact of the conference center/event space as required by the ordinance.

13. The BZA conducted the hearing on July 18, 2017, A representative of Petitioner attended the hearing and expressed Petitioner's opposition to the application, including numerous deficiencies in the application and the probable harm to Petitioner's property from the proposed hotel project.

14. Despite several inadequacies and deficiencies, the BZA approved the application and granted the special exception with conditions.

15. The decision of the BZA ... granting a special exception to Apex was unlawful, arbitrary and capricious, contrary to the applicable City Ordinances, and beyond the powers of the BZA under the Enabling Act, for reasons that include but are not limited to the following:

A. [Pearce's] presentation stated that only valet parking for hotel guests will be provided on site and totally failed to consider the impact of parking for the conference center ... when the patrons and attendees were not hotel guests.

B ...

C. The traffic study failed to take into consideration the impact of having a conference center ... as part of the project with no planned parking for these venues.

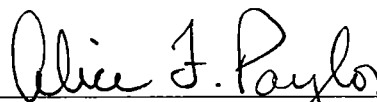
Petition, pp. 3 and 4. All of these paragraphs address the traffic and parking impacts of the conference center/event space. Respondent City does not even raise this argument in its brief.

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,

ROSEN, ROSEN & HAGOOD, LLC

A handwritten signature in cursive script that reads "Alice F. Paylor". The signature is written in black ink and is positioned above a horizontal line.

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October 9, 2018
Charleston, South Carolina

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PROOF OF SERVICE

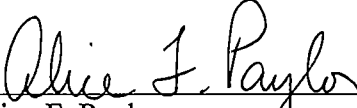
I do hereby certify that on October 9, 2018, I have served all counsel in this action with a copy of the documents herein below specified by mailing a copy of the same by United States mail, postage prepaid, to the following address:

Documents: **Initial Reply Brief of Appellant and Appellant’s Reply Designation of Matter to be Included in Record on Appeal**

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October 9, 2018

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October 9, 2018

VIA U.S. MAIL

The Honorable Jenny Abbott Kitchings
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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 Initial Reply Brief of Appellant, Appellant's Reply Designation of Matter to be Included in Record on Appeal 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 provided.

Thank you for your consideration of this request.

With kind regards, I am

Sincerely yours,


Alice F. Paylor

AFP/tnd

Enclosures

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

9629.000

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