THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Case No. 2012-212228

Tobacco Merchant ..... Appellant,

v.

City of Columbia Zoning Administrator,
Board of Zoning Appeals, and City of Columbia. ..... Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

This is a zoning dispute. The main issue in this case is whether the Tobacco Merchant, a retail tobacco store, can sell beer and wine as an accessory use or whether it should be required to obtain a special exception to operate a drinking establishment.

In September 2009, the City of Columbia Zoning Administrator determined that Appellant Tobacco Merchant's use of its property as a drinking place was not permitted by the City of Columbia Zoning Ordinance. (BOZA000011-14, 23). Tobacco Merchant appealed the Zoning Administrator's decision to the Board of Zoning Appeals (BOZA). Tobacco Merchant argued that the Zoning Administrator improperly characterized its business as a drinking place.

BOZA conducted two hearings and upheld the Zoning Administrator's determination that the Tobacco Merchant was operating as a drinking place. Drinking places are not permitted within the subject zoning district without first obtaining a special exception from BOZA. Tobacco Merchant appealed BOZA's decision to the circuit court.

The circuit court heard the appeal of BOZA's decision on February 13, 2012. On April 4, 2012, the circuit court denied Tobacco Merchant's appeal and affirmed BOZA's decision finding that Tobacco Merchant was operating as a drinking establishment in violation of its zoning classification. Tobacco Merchant then filed its notice of appeal with this Court.

STATEMENT OF FACTS

Appellant Tobacco Merchant is a retail tobacco store located in the Harbison area of Columbia and has operated at that location as a cigar and tobacco store since 1997. *Videotape of January 12, 2010 hearing of City of Columbia Board of Zoning Appeals* at DVD marker 16:21. In 2009, William and Jackie Slicer purchased the business and on April 22, 2009, they sought approvals to operate the business in the City. [BOZA000011, 000024] The Zoning Division approved the use of the business for a "cigar store/stand", which is permitted in the C-3 zoning district where Tobacco Merchant is located. *Id.*

The Zoning Division characterized the business with the use code of "5993" as found in its Table of Permitted Uses at section 17-258 of the City Code. (BOZA000011, 000024) This internal use code signifies businesses with the use of "cigar store and stands." City Code, §17-258. According to the Table of Permitted Uses, cigar stores and stands are permitted in a C-3 district. A Zoning Permit was issued to Tobacco Merchant for a "Tobacco stand." (BOZA000048)

On September 3, 2009, the Zoning Division received a complaint that the Tobacco Merchant was operating as a drinking place. (BOZA000011) A "drinking place" is defined as an "establishment engaged in the retail sale of drinks, such as beer, ale or wine for consumption on the premises." City Code, § 17-55. It is undisputed that Tobacco Merchant is engaged in the retail sale of alcohol for on-premises consumption. The Zoning Division inspected the location and met with the business owner and his counsel regarding the complaint. The Zoning Division informed the owners of its view that the business was being operated as a drinking place without a special exception. (BOZA000012) A drinking place is permitted in a C-3 district only by special exception. City Code, §17-258.

The Zoning Division issued a Written Notice of Violation on September 16, 2009. (BOZA000023) The notice stated that the location was being operated as a drinking establishment without obtaining a special exception. The notice invited the owner to submit an application for a special exception.[1] Id.

However, rather than apply for a special exception to operate as a drinking establishment, the owner appealed the Zoning Administrator's determination to BOZA. (BOZA000021) Tobacco Merchant asserted that the Zoning Administrator was in error because "[t]he Tobacco Merchant legally operates as a tobacco retail establishment which has incidental sales [of alcohol] pursuant to the City of Columbia ordinances." Id.

BOZA first heard this matter on January 12, 2010. The Zoning Administrator stated his position that the business was being classified as a drinking place, in addition to its use as a tobacco stand, based upon the sale of alcohol and the amount of area in the building attributed to drinking. The Zoning Administrator stated that the sale of alcohol did not meet the definition of accessory use found in the Zoning Ordinance. This determination was based on the amount of area that is allocated to opportunities for drinking and the size of the bar, as well as advertisements for drinking located outside of the store. (BOZA000032). At the time of this hearing there was no data available regarding sales. BOZA remanded the matter to the Zoning Division in order to gather additional facts concerning sales figures, square footage, and customers' utilization of the business. (BOZA 000139 – BOZA 000147)

BOZA next heard the matter on February 9, 2010. The Zoning Administrator provided evidence that approximately 27% of the area of the business could be attributed to retail sales of

[1] Tobacco Merchant made it clear that to obtain a special exception and operate as a drinking place would put it in violation of the ordinance prohibiting smoking in workplaces. *See* City Code § 8-217. (BOZA 000140 – 000141). The ban prohibits smoking in public buildings, including bars and restaurants. An exception is made for smoking in retail tobacco stores.

tobacco only whereas approximately 58% of the floor space constituted areas where alcohol could be consumed. The Zoning staff provided photographs of the full bar and also provided a floor plan showing the areas separated for drinking and for retail tobacco sales. (BOZA000009, BOZA000030-000040) The blue areas depicted on the floor plan show areas available for drinking. (BOZA000009) The floor plan also shows the location and setup of the bar and seating for the bar containing at least 19 chairs.

The owner provided sales figures suggesting that approximately 10% of sales came from alcohol with the other 90% coming from tobacco products. However, Tobacco Merchant admitted that sales figures and customer usage would change depending on the time of day. The owner acknowledged that during the daylight hours the business use was predominantly tobacco sales but as the evening progressed alcohol sales would increase. (BOZA 000149) In the ensuing discussion about the use of the business the owner acknowledged that a person could enter the establishment to drink and not smoke. A patron would not be required to purchase tobacco in order to purchase a drink. The owner also acknowledged that nothing would prohibit a patron from bringing his own cigarettes and ordering drinks at the bar. (BOZA 000150)

At the two hearings, the issue was framed as whether the sale of alcohol at the establishment was an accessory use. The Zoning Administrator took the position that the sale of alcohol failed the definition of accessory use found in the Zoning Ordinance. The Appellant argued that the sale of alcohol was an accessory or incidental use and that the retail sale of tobacco was the principal use of the location. (BOZA000149).

At the conclusion of the second hearing, a motion was made to reverse the Zoning Administrator's decision and find that the on-site sale and consumption of alcohol was an accessory use. This motion failed upon a 3-3 vote. An alternative motion was made to uphold

the Zoning Administrator's decision. This motion also failed upon a 3-3 vote. Therefore, pursuant to BOZA's written regulations, the Zoning Administrator's decision classifying the business use of the Appellant's property as a drinking establishment was upheld. (BOZA000007, 000151).

ARGUMENT

"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." S.C. Code Ann. § 6-29-840 (Supp. 2012). "Courts are bound to afford substantial deference to the decision of those charged with interpreting and applying local zoning ordinances." *Clear Channel Outdoor v. City of Myrtle Beach,* 372 S.C. 230, 234, 642 S.E.2d 565, 567 (S.C. 2007). A court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision. *Id.*

I. The circuit court correctly determined that the Tobacco Merchant is a drinking place and that the sale of alcohol did not constitute an accessory use.

Tobacco Merchant argues that the circuit court erred in finding that it is a drinking place because it has "incidental sales of alcohol pursuant to the City of Columbia ordinance on smoking." As will be discussed herein, the question should not be whether alcohol sales are "incidental" pursuant to the smoking ordinance but whether the business's use as a drinking place is an accessory use to its operation as a tobacco store. The circuit court correctly found that the Tobacco Merchant is a drinking place and that the sale of alcohol did not constitute an accessory use under the City of Columbia zoning ordinances.

A "drinking place" is defined as an "establishment engaged in the retail sale of drink, such as beer, ale or wine for consumption on the premises." City Code, § 17-55. With this definition in mind, it is undisputed that Tobacco Merchant is operating as a "drinking place". The issue is whether this use is merely an accessory use. Depending on the answer to this question, Tobacco Merchant can either continue serving alcohol without a special exception, or Tobacco Merchant will be required to obtain a special exception from BOZA to continue operating as a drinking place.

An "accessory use" is:

> (1) Subordinate to and serves a principal building or principal use; (2) Subordinate in area, extent or purpose to the principal building or principal use served; (3) Designed for the comfort, convenience or necessity of occupants of the principal use served; **and** (4) Located on the same lot as the principal building or principal use served, with the exception of such accessory off-street facilities as are permitted to locate elsewhere than on the same lot with building or use served. Accessory uses shall include but not be limited to barns, sheds, home tennis courts, swimming pools, automobile garages, decks, patios and private recreation areas.

City Code, § 17-55, Definitions (emphasis added). "An accessory use must be one 'so necessary or commonly to be expected that it cannot be supposed that the ordinance was intended to prevent it.'" *Whaley v. Dorchester County Zoning Bd. of Appeals*, 337 S.C. 568, 579, 524 S.E.2d 404, 410 (1999). An accessory use is one that is dependent upon or pertains to the principal use and is considered an integral part of the primary use. 8 McQuillin Mun. Corp. §25:151 at 640-1 (3d ed. 2010). "Accessory uses are those which are customarily incident to the principal use." *Whaley*, 337 S.C. at 579, 524 S.E.2d at 410.

Based upon its view of the facts, BOZA upheld the Zoning Administrator's determination that Tobacco Merchant was operating as a drinking place in violation of its zoning classification and that the sale of alcohol for on-premises consumption did not constitute an accessory use to a tobacco shop. In its Order, the circuit court ruled that the facts presented to BOZA "demonstrate that the sale of alcohol is not subordinate to the sale of tobacco" and that "the sale of alcohol is not designed for the comfort, convenience or necessity of the occupants. Rather, the sale of alcohol was designed and intended to bring in outside persons for a drink. The sale and consumption of alcohol at a tobacco retail store is a luxury, not a necessity." *Order* at p.7.

The following facts were presented to BOZA and reasonably support its decision that the Tobacco Merchant's sale of alcohol did not constitute an accessory use:

- area - only 27% of the business was devoted exclusively to tobacco sales, whereas beer and wine could be consumed in approximately 58% of the area (BOZA000009, BOZA000148);
- the size of the bar area and the number of seats allocated to the bar area (19 seats) (BOZA000009);
- the business advertised the sale of beer on a store-front sign (BOZA000032);
- the business does not require a customer to purchase tobacco in order to purchase alcohol (BOZA 000150);
- the business does not restrict the use of tobacco products to those purchased in-house (BOZA 000150);
- the sales figures may not accurately describe the character of the business at different times of the day (BOZA000142, BOZA000144);
- the nature of the business changes from day to night (BOZA000144);
- the sale of tobacco started before the business installed a bar and began serving alcohol (BOZA 000142-3); and
- the bar was installed without obtaining a building permit (BOZA000080).

These facts demonstrate that the circuit court was correct in affirming that Tobacco Merchant's sale of alcohol did not meet the definition for an accessory use. The sale of alcohol for on-premises consumption is not dependent upon the sale of tobacco, nor is it an integral part of the sale of tobacco. Clearly, the ability to buy and consume alcohol in the store is not subordinate to and does not serve the sale of tobacco where the purchase of tobacco is not required to consume alcohol in the store. The sale of alcohol can stand on its own. This is evident from the amount of space devoted to alcohol sales and use and the fact that a bar area

exists with numerous seats available for patrons to enjoy drinks. (BOZA 000011; BOZA 000030-000040)

In its brief, Tobacco Merchant attempts to point out statements made by BOZA members regarding the alleged accessory use of the business as discussed during BOZA's hearings on this matter. However, Tobacco Merchant does not dispute the facts presented to BOZA that reasonably support its decision and the circuit court's decision that the sale of alcohol did not constitute an accessory use. Isolated comments or observations made by BOZA members during the hearing do not conclusively show that alcohol sales are an accessory use.

Tobacco Merchant's attempt to set forth differing views and an alternative conclusion regarding accessory use in no way limits or reduces the evidence supporting BOZA's decision. It is certainly acknowledged that others viewing the same facts may come to a different conclusion than that reached by BOZA. However, based on the record as whole, BOZA was presented with evidence upon which it could reasonably conclude that the sale of alcohol did not constitute an accessory use. *See Restaurant Row Assocs. v. Horry County,* 335 S.C. 209, 516 S.E.2d 442 (1999) (stating that a court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision).

Rather than focus only on whether the sale of alcohol is an accessory use, Tobacco Merchant spends a large part of its argument contending that the sale of alcohol is "incidental" to the sale of tobacco and is thus allowed pursuant to the City's ordinances prohibiting smoking in workplaces. Tobacco Merchant cites to sections 8-217, 8-816 [sic], and 8-818 [sic] of the City of Columbia Code of Ordinances.[2] The smoking ordinances generally prohibit smoking in

[2] Respondents understand Tobacco Merchant to be citing to sections 8-216 ("Definitions"), and 8-218 ("Exceptions") of the City's smoking ordinance. However, the Appellant did not enter into evidence the subject ordinance sections. Courts will not take judicial notice of municipal ordinances. *See Harkins v. Greenville County,*

workplaces but they make an exception to allow smoking in retail tobacco stores. A "retail tobacco store" is an establishment "whose primary purpose is to sell or offer for sale to consumers, but not for resale, tobacco products and paraphernalia, in which the sale of other products is merely incidental . . . ." City Code, § 8-216. The smoking ordinances are not relevant to the present dispute and should not be considered. The Respondents are not seeking to enforce any provision of the smoking ordinances. BOZA does not have jurisdiction to hear and decide issues related to any ordinances other than zoning ordinances. (BOZA000150) See S.C. Code § 6-29-800(A) (1) (Supp. 2012) (stating the board of appeals has the power to hear and decide appeals concerning decisions made by the zoning administrator in the enforcement of the zoning ordinance).

In any event, the record reasonably supports the conclusion that the sale of alcohol is not "incidental" to the sale of tobacco products. An incidental use in the zoning context means that it is a use which is dependent on or pertains to the principal use. *See* 2 Rathkopf's The Law of Zoning and Planning § 33.3 (4th ed.); *see also* Black's Law Dictionary 1540 (7th ed. 1999) (defining "incidental use" in the zoning context as a "land use that is dependent on or affiliated with the land's primary use").

Tobacco Merchant points to the ratio of alcohol sales to tobacco sales to support its bald assertion that the sale of alcohol is "incidental" to tobacco sales. Tobacco Merchant does not cite to any law or authority for this proposition. The sales numbers do not support a conclusion that the sale of alcohol is incidental (or an accessory use). The sales numbers tell us nothing about whether one product is dependent on the other product in the zoning context. There is no evidence in this matter that alcohol sales are dependent on the primary use of the business as a

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340 S.C. 606, 533 S.E.2d 886 (2000) (declining to take judicial notice of a zoning ordinance regarding zoning appeals which was not included in the record on appeal).

retail tobacco store. In fact, the evidence shows that alcohol sales are not dependent on tobacco sales where one can patronize the business only for a drink.

Respondents submit that the sales figures are of limited value in determining whether alcohol sales are incidental. Zoning determinations such as in the present case are made based on the **use** of property; sales figures may not truly reflect how an area is being **used**.

A narrow approach to incidental or accessory uses relying too much on sales numbers may not adequately take into account the definitional approach of determining an accessory use and whether one use is "customarily incident" to another. *See Whaley*, 337 S.C. at ___, 524 S.E.2d at 410 (finding that parking the cab of an 18-wheeler at a residence was not an accessory use because such use is not "customarily incident" to a residential zone). It is not the numbers that matter but rather how the two uses are dependent on, or affiliated with, one another. Here, there is no evidence that alcohol is dependent on tobacco or that alcohol sales are customarily incident to tobacco sales.[3]

The circuit court's decision upholding BOZA's determination that the sale of alcohol is not an accessory use to a tobacco store should be affirmed.

II. BOZA's final decision was procedurally and substantively sufficient under state law and municipal ordinances.

Tobacco Merchant argues that the circuit court should not have affirmed BOZA's decision because BOZA made no specific findings of fact or conclusions of law. However, BOZA's February 24, 2010, final decision conforms to the requirements of state law and local ordinance. The final decision states in relevant part:

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[3] Tobacco Merchant states that tobacco retailers are allowed as a matter of course to sell beer and wine as an accessory use in neighboring jurisdictions and that such practice is common and accepted. App. Initial Br. at 9. These assertions are unsupported by the record and Tobacco Merchant does not cite any authority for these unfounded statements.

> Based upon your application, submitted documents, and testimony considered by the Board of Zoning Appeals at the January and February 9, 2010 public hearing, and in accordance with § 17-113(a) of the Zoning Ordinance, the Board of Zoning Appeals failed to approve your Application for Administrative Appeal. On February 9, 2010, upon a motion to overturn the Zoning Administrator's decision of the classification of this business, the Board voted 3 in favor (Cromartie, Hubbard and Thompson) and 3 against (McMeekin, Webber-Akre and Young). A subsequent motion was made to uphold the Zoning Administrator's decision and the Board voted 3 in favor (McMeekin, Webber-Akre and Young) and 3 against (Cromartie, Hubbard and Thompson). Under the Rules of Procedure Section V.1 for the Board of Zoning Appeals, in the event of a tie vote, an alternative motion may be made. If no affirmative action on a motion is taken by the board, it will be determined that the appeal did not receive the requested relief from the board, and therefore the appeal is denied. Therefore, the decision of the Zoning Administrator to classify your business use as a drinking establishment is upheld.

(BOZA000007)

Tobacco Merchant argues that South Carolina Code §6-29-800 requires that BOZA make findings of fact and conclusions of law. Section 6-29-800(F) merely requires that final decisions be in writing and on file as a public record and that any findings of fact and conclusions of law be separately stated and delivered to the parties.[4] Moreover,

> It is well settled that courts reviewing the decisions of zoning boards . . . may look to written documents as well as records of proceedings as sufficient formats for final decisions. For example, in *Vulcan Materials Co. v. Greenville County Board of Zoning Appeals,* 342 S.C. 480, 536 S.E.2d 892 (Ct. App. 2000), this court upheld a circuit court finding that a transcript of a zoning board hearing constituted a sufficient final written decision. On the question of whether the transcript alone could satisfy the statutory requirement of a written decision, the court opined that "[g]enerally, the format of a final decision is immaterial as long as the substance of the decision is sufficiently detailed so as to allow

[4] "All final decisions and orders of the board must be in writing and be permanently filed in the office of the board as a public record. All findings of fact and conclusions of law must be separately stated in final decisions or orders of the board which must be delivered to parties of interest by certified mail." S.C. Code Ann. §6-29-800(F) (Supp. 2012).

> a reviewing court to determine if the decision is supported by the facts of the case."

Austin v. Bd. of Zoning Appeals, 362 S.C. 29, 34-5, 606 S.E.2d 209, 212 (Ct. App. 2004) (internal citation omitted). In fact, "[t]he minutes normally constitute the BZA's final findings." *Wyndham Enterprises, LLC v. City of North Augusta*, 401 S.C. 144, 149, 735 S.E.2d 659, 662 (Ct. App. 2012).

Tobacco Merchant cites *Massey v. City of Greenville Bd. of Zoning Adjustments*, 341 S.C. 193, 532 S.E.2d 885 (Ct. App. 2000), in support of its argument that BOZA failed to issue sufficient findings for a decision. However, *Massey* is inapposite here because the transcript was the only record of the board's action and the transcript was "virtually indecipherable." *Id.* at 197, 532 S.E.2d at 889. Such is not the case here. The recordings of the two BOZA hearings are clear and audible and there is no argument that the official minutes are not a good and accurate reflection of the hearings. At no time has Tobacco Merchant objected to the record as insufficient. Nor has Tobacco Merchant requested that a transcript be made of the BOZA hearings.

As in *Austin*, the evidence considered by BOZA is "clearly laid out in the transcript of the hearing" and in the written materials submitted to BOZA and made part of the record. *Austin*, 362 S.C. at 35, 606 S.E.2d at 212. The written materials, taken together with the record of the public hearing, including the minutes, "provides sufficient basis for a reviewing court to determine whether the decision was supported by the facts of the case." *Id.* For example, in addition to the minutes and the video of the proceedings, the Zoning Administrator set forth detailed written evidence concerning its basis for concluding that the classification of the business as a drinking place did not constitute an accessory use. (BOZA000011 – BOZA000014; BOZA000080 – BOZA000081).

In this case, BOZA upheld the Zoning Administrator's decision based "upon the application, submitted documents, and testimony considered by the Board of Zoning Appeals at the January [12, 2010] and February 9, 2010 public hearing . . . ." (BOZA000007). The facts upon which BOZA based its decision are adequately set forth in the record presented to the circuit court. Therefore, this Court should hold that BOZA's final decision complied with state law and city ordinances.

III. BOZA should not be estopped from considering whether the sale of alcohol constituted an accessory use.

Tobacco Merchant argues that the Respondents should be estopped from enforcing zoning ordinances regarding drinking places because "the city approved the **business license**." App. In. Br. at 13 (emphasis added).

Tobacco Merchant argues that it sought approval from the City Business License Division and the Zoning Division to sell tobacco products and the incidental sale of beer and wine. Tobacco Merchant claims in its brief that the City "approved the Tobacco Merchant's license as a Cigar Lounge." This is incorrect and there is no evidence in the record to support this statement. Apparently, the Business License Division listed the type of business as a "Cigar Bar/Shop."[5] (BOZA000120) However, there is no evidence in the record that the Business License Division approved the sale of alcohol. There is no evidence that the characterization of the business by the Business License Division was an approval to sell alcohol or that any such approval was recognized by the Zoning Division. The Zoning Division described the use of the property as a "cigar store/stand" on the City forms. (BOZA000011; BOZA000120) The Zoning Division issued a Zoning Permit with a description of the business as a "Tobacco stand."

[5] There is no evidence in the record of what is meant by either "Cigar Lounge" or "Cigar Bar/Shop."

(BOZA000048) The Business License Division's characterization of this business is not relevant to the Zoning Division's enforcement of zoning ordinances in this matter.

"As a general rule, estoppel does not lie against the government to prevent the due exercise of its police power or to thwart the application of public policy." *Greenville County v. Kenwood Enters., Inc.,* 353 S.C. 157, 171, 577 S.E.2d 428, 435 (2003), *overruled on other grounds by Byrd v. City of Hartsville,* 365 S.C. 650, 620 S.E.2d 76 (2005). If estoppel is applicable against a government agency, a relying party must prove: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) justifiable reliance upon the government's conduct, and (3) a prejudicial change in position. *Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 692 S.E.2d 499 (2010). However, "[n]o estoppel can grow out of dealings with public officers of limited authority, and the doctrine of equitable estoppel cannot ordinarily be invoked to defeat a municipality in the prosecution of its public affairs because of an error or mistake of . . . one of its officers or agents . . . ." *DeStefano v. City of Charleston,* 304 S.C. 250, 257-8, 403 S.E.2d 648, 653 (1991).

Tobacco Merchant alleges that because it was "approved" by the Business License Division to sell alcohol, the Zoning Division could not prevent it from doing so. However, the Zoning Division is a separate division of City government and cannot be bound by a decision of a different licensing division.

> Although the general aim of both zoning and licensing regulations is the promotion of the general welfare, each is independent of the other and seeks to accomplish its purpose by a different means. The fact that a zoning ordinance permits a use in a particular district does not authorize the use there without a license. On the other hand, a license or permit does not authorize a use in violation of zoning laws. In other words, a license or permit does not relieve one from complying with a zoning ordinance, and this generally is true of a state license or permit.

8 McQuillin Mun. Corp. § 25:14 at 62-3 (3d ed. 2010).

In addition to asserting that the Zoning Division should be estopped because the Business License Division issued a license, Tobacco Merchant appears to be claiming that the Zoning Division knew that retail sales of alcohol for on-premises consumption would be conducted as part of the retail tobacco business but that the Zoning Division changed its mind five or six months after issuing the zoning permit. There is no evidence in the record that the Zoning Division knew of intended retail sales of alcohol or that it approved retail sales of alcohol.

According to the facts presented at the hearing, Mrs. Slicer went to the Business License Division in April 2009 and inquired about forms needed for the sale of tobacco and for the retail sale of beer and wine. DVD of Feb. 9, 2010, hearing at 17:19. Counsel for Tobacco Merchant also indicated that Ms. Slicer completed all of the necessary forms and specifically informed City officials that Tobacco Merchant intended to add beer and wine as an "incidental" part of the sale of tobacco products.[6] *Id.* at 17:39. There is no evidence in the record that Ms. Slicer specifically informed the Zoning Division of any plans to sell alcohol. It was confirmed at the hearing that the Zoning Permit was approved **only** as a "cigar store and stand." *Id.* at 39:53.

In *Quail Hill*, the Court held that a landowner receiving erroneous zoning information from an unauthorized employee was not sufficient to estop the County from enforcing a zoning classification preventing a landowner from developing his property. In that case, the landowner consulted a county subdivision coordinator and the county tax assessor to determine if the zoning classification for his property would allow him to develop a neighborhood of manufactured homes. The county subdivision coordinator and tax assessor erroneously advised the landowner that he could. Based on the fact that the subdivision coordinator and tax assessor were not

[6] Alternately, Tobacco Merchant claimed at the hearing that it was the City that completed all of the forms rather than Ms. Slicer. DVD of Feb. 9, 2010, hearing at 21:19.

employees of the zoning division and that the Zoning Administrator was the only authorized county employee to interpret or alter zoning classifications, the Court determined the landowner was given erroneous information by unauthorized individuals and could not rely upon that information to estop the county. *Quail Hill* at 237.

In the present case, Tobacco Merchant makes a similar argument – that the Zoning Division should be estopped from enforcing the C-3 zoning classification restrictions because a different division within City government may have approved the sale of alcohol.[7] *Quail Hill* makes it clear that a party cannot justifiably rely on assertions from unauthorized employees. There is no evidence that Business License Division employees are authorized to speak on behalf of the Zoning Division. Therefore, the Respondents cannot be estopped form enforcing zoning classifications based on any representations or licenses issued by the Business License Division.

The Court in *Quail Hill* also denied estoppel to the landowner because the landowner had the means of knowledge as to the true zoning classification of his property. *Id.* Similarly, Tobacco Merchant did not lack knowledge of the Zoning Division's classification of the use of its business. The Zoning Permit clearly stated that the business was classified as a "Tobacco stand." (BOZA000048). Moreover, the Business License Clearance Form indicates that the business was approved by the Zoning Division only as a "cigar store and stand." (BOZA000024; DVD of Feb. 9, 2010, hearing at 39:53). Tobacco Merchant was not justified in relying upon the Zoning Permit or the Business License Clearance form to think it would be able to install a bar and begin serving alcohol for on-premises consumption.

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[7] Respondents dispute that any City employee or division permitted Tobacco Merchant to sell alcohol. As set forth, the only indication that Tobacco Merchant informed the City of its plans to sell alcohol was the self-serving statement by Tobacco Merchant's counsel that Mrs. Slicer informed City officials. Mrs. Slicer did not testify at the hearing and Tobacco Merchant did not call any witnesses from the Business License Division or the Zoning Division.

Accordingly, the circuit court's decision that the Respondents should not be estopped from enforcing its zoning restrictions against Tobacco Merchant should be affirmed.

IV. BOZA's classification of Tobacco Merchant as a drinking place did not violate Tobacco Merchant's equal protection or due process rights.[8]

Tobacco Merchant argues that it has been treated "differently than other similarly situated businesses" such that the Respondents are violating Tobacco Merchant's equal protection rights. However, as correctly found by the circuit court, Tobacco Merchant fails to establish a cause of action for an equal protection violation.

Tobacco Merchant also makes no attempt to explain that it is a member of a class or that any classification was not reasonable related to a legitimate government interest. *See State v. White*, 348 S.C. 532, 560 S.E.2d 420 (2002) (holding the challenging party has the initial burden "to show that the ordinance is arbitrary and has no reasonable relation to a lawful purpose"). In support of its argument that Tobacco Merchant was denied equal protection, Tobacco Merchant simply asserts that its business was treated differently than other similarly situated business. Tobacco Merchant vaguely refers to "other similarly situated businesses." Tobacco Merchant does not explain how the other vaguely-referenced businesses are similarly-situated to the Tobacco Merchant. Nor does Tobacco Merchant explain how the Respondents have treated the alleged similarly-situated businesses. To do so now would be speculative. For instance, the Respondents may have determined, under the facts of other cases, that the sale of alcohol was an

[8] Respondents assert that Tobacco Merchant's argument concerning equal protection and due process is so short and conclusory that it is difficult to frame a response and should be deemed abandoned. *See South Carolina Dep't of Probation, Parole & Pardon Servs. v. Reynolds*, 343 S.C. 465, 540 S.E.2d 480 (Ct. App. 2000) (stating that appellate court will decline to consider an argument where it is so conclusory as to be an abandonment of the issue). Moreover, Tobacco Merchant's statement of Issue No. 4 asserts that its equal protection **and** due process rights were violated. Tobacco Merchant does not cite any law, authority or facts to support its statement that its due process rights were violated.

accessory use. However, Tobacco Merchant does not provide a record for this Court to make any determination whether any of the other vaguely-referenced businesses are truly similarly-situated or whether the City has treated them differently. More importantly, there is no evidence in the record of a retail tobacco store located in a C-3 zoning district, like Tobacco Merchant, that installed a bar, bar stools, coolers, and TVs, and attempted to conduct retail sales of alcohol for on-premises consumption.

"To prove that a statute has been administered or enforced discriminatorily, more must be shown than the fact that a benefit was denied to one person while conferred on another. A violation is established only if the plaintiff can prove that the state *intended* to discriminate." *Sylvia Dev. Corp. v. Calvert County,* 48 F.3d 810, 819 (4th Cir. 1995) Tobacco Merchant fails to argue or establish facts that Respondents denied a benefit to Tobacco Merchant that it conferred on others or that it intended to discriminate against Tobacco Merchant by denying its appeal.

Tobacco Merchant appears to mischaracterize the issue of code enforcement with one of equal protection. The simple fact that the Respondents have enforced zoning ordinances against Tobacco Merchant does not establish a claim for a violation of equal protection. The record shows that the Zoning Division received a complaint and performed an investigation. (BOZA000009). There is no evidence Respondents arbitrarily decided to inspect and cite Tobacco Merchant for a violation of the zoning ordinance. Moreover, Respondents' enforcement of the zoning ordinance against Tobacco Merchant is not conditioned upon every other similarly situated business, if any, being cited at the same time.

Finally, Respondents have not violated Tobacco Merchant's due process rights. The fact that zoning ordinances may create some situations where Tobacco Merchant does not have unlimited free use of its property does not automatically equate to constitutional infirmity. *See*

Bear Enters. v. County of Greenville, 319 S.C. 137, 141, 459 S.E.2d 883, 886 (Ct. App. 1995) ("A legislative body does not deny due process simply because it does not permit a landowner to make the most beneficial use of its property."). Tobacco Merchant has not been deprived of its property or precluded from obtaining beneficial use of the property. There is no dispute that the business may lawfully operate as a retail tobacco store, as it has done since 1997.

V. BOZA's ruling did not constitute a taking without compensation.

Tobacco Merchant argues that BOZA's decision resulted in a taking of Tobacco Merchant's property without just compensation because Tobacco Merchant has been denied an economically viable use of its property. Respondents assume that Tobacco Merchant is attempting to assert a regulatory takings claim. Tobacco Merchant cites *Agins v. City of Tiburon*, 447 U.S. 255 (1980), in support of its claim. However, the takings test formulated by Agins has been abrogated and is not the proper precedent under which to analyze regulatory takings claims. *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005).

Regulatory takings challenges should be analyzed under the standards set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). The analysis under *Penn Central* includes "a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). Tobacco Merchant does not set forth any facts and makes no attempt to establish that Respondents have violated any of the factors governing regulatory takings.[9]

[9] Tobacco Merchant has abandoned this issue by its short and conclusory argument. *See South Carolina Dep't of Probation, Parole & Pardon Servs. v. Reynolds*, 343 S.C. 465, 540 S.E.2d 480 (Ct. App. 2000) (stating that appellate court will decline to consider an argument where it is so conclusory as to be an abandonment of the issue).

On the other hand, Tobacco Merchant has not been precluded from obtaining beneficial use of its property. Its use as a tobacco retail store may continue, just as it did for the thirteen years prior to the Slicers' acquisition of the business.

In addition, Respondents assert that this issue is not ripe for review. Tobacco Merchant seeks to serve alcohol in its establishment. Drinking places are permitted as a use by special exception in the subject zoning district. Tobacco Merchant decided not to seek a special exception to operate a drinking place. (BOZA000021, 000140-1). Tobacco Merchant has not sought, nor been deprived of, a special exception to operate a drinking place. It is entirely possible that Tobacco Merchant could operate a retail tobacco store and a drinking place at the same location. Tobacco Merchant cannot now claim that it has suffered a taking where the use it seeks to establish may be allowed if it made application for a special exception.

VI. BOZA's tie votes, which had the effect of upholding the Zoning Administrator's decision, did not deny Tobacco Merchant's due process rights.

As described earlier, at the conclusion of the February 9, 2010, hearing, BOZA entertained two alternative motions concerning the Zoning Administrator's determination that the Tobacco Merchant was operating as a drinking place without a special exception. The first motion sought to overturn the Zoning Administrator's decision. The second motion sought to affirm the Zoning Administrator's decision. Each motion resulted in a tie vote by the count of 3-3. Therefore, pursuant to BOZA's procedural rules, in the event of a tie vote, it will be determined that the issue did not receive the requested relief from BOZA and the appeal will be

denied. (BOZA000007, 000151). Tobacco Merchant argues that this procedure violates its right to due process.[10]

Initially, Respondents assert that Tobacco Merchant did not preserve this issue for review. Tobacco Merchant did not object to the tie votes, or to BOZA conducting business with six members. It was incumbent upon Tobacco Merchant to timely object to the procedures employed by BOZA and to the result of the tie votes. Its failure to do so is fatal to this Court's review of the issue. In order to preserve an issue for review, the issue must be raised to and ruled upon by the lower tribunal. *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998). Moreover, Tobacco Merchant did not request a rehearing.

In any event, BOZA's tie votes did not deprive Tobacco Merchant of due process. BOZA may conduct business if a quorum is present. City Code, § 17-111. There is no dispute that a quorum existed to conduct business and to hear Tobacco Merchant's appeal. BOZA is specifically authorized to establish rules of procedure. *See* S.C. Code Ann. § 6-29-800(B) (Supp. 2012) (acknowledging the board's use of its own rules to determine appeals); City Code, § 17-111(b)(1) (authorizing BOZA to establish rules of procedure). BOZA has enacted a rule of procedure to govern the situation where a quorum is present to conduct business but where the quorum could result in tie votes. In such a situation, if no affirmative action is taken by BOZA on alternative motions, it will be determined that the appeal did not receive the requested relief, and its effect is to deny the appeal. (BOZA000007).

Tobacco Merchant does not cite any authority to support is argument that BOZA's procedure violates due process. Instead, Tobacco Merchant references general statements of the law prohibiting individual members from exercising a board's powers and duties. It is clear,

[10] There is no dispute here concerning whether BOZA had the authority to promulgate its own rules of procedure. There is also no dispute concerning the substance of the procedural rule at issue.

however, that BOZA's duties were not carried out by individual members in this instance. There is no dispute or argument that the meeting was not properly called and conducted.

BOZA had the required quorum of its members present in order to conduct business in the instant case. City Code §17-111. Neither of BOZA's two alternative motions to affirm or reverse the Zoning Administrator's decision garnered a majority vote, so by operation of the procedural rule, Tobacco Merchant's appeal was denied. Tobacco Merchant received all of the due process to which it was entitled.

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the circuit court. BOZA's decision was in all respects proper under state and municipal law. Respondents correctly determined that Tobacco Merchant's sale of alcohol in a C-3 zoning district was not an accessory use and required a special exception.

Respectfully submitted,

By: _____
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit court Judge

Case No. 2010-CP-32-01368

Tobacco Merchant ..... Appellant,

v.

City of Columbia Zoning Administrator,
Board of Zoning Appeals, and City of Columbia. ..... Respondents.

RESPONDENTS' DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Respondents propose the following to be included in the Record on Appeal:

1. Minutes of City of Columbia Board of Zoning Appeals dated January 12, 2010 and February 9, 2010, Bates stamped BOZA 000139-000154;
2. DVD video of January 12, 2010 hearing of City of Columbia Board of Zoning Appeals, beginning at DVD marker 7:00 and ending at 54:43.
3. DVD video of February 9, 2010 hearing of City of Columbia Board of Zoning Appeals, beginning at DVD marker 4:20 and ending at 41:35.
4. Order of the Circuit court dated April 4, 2012;
5. Record submitted to Circuit court, Bates stamped BOZA 000001-000138, to include color copies;
6. Respondents' Memorandum of Law, filed February 3, 2012.
7. Respondents' Supplemental Memorandum of Law with exhibits; filed March 6, 2012.

I certify that this designation contains no matter which is irrelevant to this appeal.

April 10, 2013

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PROOF OF SERVICE

I certify that I have served the Respondents' Initial Brief and Designation of Matter to be included in the Record on Appeal on the Appellant, Tobacco Merchant by depositing a copy of it in the United States Mail, postage prepaid, on April 10, 2013, addressed to their attorney of record, Darryl D. Smalls, Esquire, PO Box 212724, Columbia, SC 29221.

April 10, 2013

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