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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

CASE NO. 2020-CP-26-00785

ANI CREATION, INC. d/b/a Rasta; ANI CREATION, INC. d/b/a Wacky T's; BLUE SMOKE, LLC d/b/a Doctor Vape; BLUE SMOKE, LLC d/b/a Blue Smoke Vape Shop; ABNME, LLC d/b/a Best for Less; KORETZKY, LLC d/b/a Grasshopper; RED HOT SHOPPE, INC.; E.T. SPORTSWEAR, INC. d/b/a Pacific Beachwear; MYRTLE BEACH GENERAL STORE, LLC; I AM IT, INC. d/b/a T-Shirt King; and BLUE BAY RETAIL, INC. d/b/a Surf's Up, Petitioners,

Appellants

vs.

CITY OF MYRTLE BEACH BOARD OF ZONING APPEALS and KEN MAY, ZONING ADMININISTRATOR FOR CITY OF MYRTLE BEACH, Respondents,

Respondents

NOTICE OF APPEAL

The Petitioners appeal the Order Denying Appeal and Affirming Order of City of Myrtle Beach Board of Zoning Appeals filed April 22, 2021 and the subsequent Order Denying Petitioners' Motion to Reconsider dated September 16, 2021. Appellants received a filed copy of the Order Denying Petitioners' Motion to Reconsider on September 16, 2021.

This appeal is filed in the South Carolina Supreme Court pursuant to SCAR 203(d)(1)(A)(ii) and involves a constitutional challenge to an ordinance of the City of Myrtle Beach.

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	CASE NUMBER 2020CP2600785

ANI CREATION, INC. d/b/a Rasta, ANI CREATION, INC. d/b/a Wacky T's, BLUE SMOKE, LLC d/b/a Doctor Vape, BLUE SMOKE, LLC d/b/a Blue Smoke Vape Shop, ABNME, LLC d/b/a Best for Less, KORETZKY, LLC d/b/a Grasshopper, RED HOT SHOPPE, INC., E.T. SPORTSWEAR, INC. d/b/a Pacific Beachwear, MYRTLE BEACH GENERAL STORE, LLC, I AM IT, INC. d/b/a T-Shirt King, and BLUE BAY RETAIL, INC. d/b/a Surf's Up.

Appellants,

v.

CITY OF MYRTLE BEACH BOARD OF ZONING APPEALS and KEN MAY, ZONING ADMINISTRATOR FOR CITY OF MYRTLE BEACH

Respondents.

ORDER DENYING APPEAL AND AFFIRMING ORDER OF CITY OF MYRTLE BEACH BOARD OF ZONING APPEALS

STATEMENT OF THE CASE

This case involves the above business owners (Appellants) in the City of Myrtle Beach, South Carolina, who seek judicial invalidation of City of Myrtle Beach's zoning ordinance § 1807 which is a zoning ordinance creating an overlay zone and which Appellants claim violates their due process rights. The appeal was first heard by the City's Board of Zoning Appeals (BZA) who affirmed a decision by the zoning administrator and who found the appellants engaged in certain uses that violated §1807. The BZA affirmed the zoning administrator's decision by finding that Appellants were engaging in uses that were prohibited by §1807. Appellants also attacked the zoning administrator's decision on the ground that

§1807 was invalid. However, the BZA found that it did not have authority to consider the validity of §1807 because the BZA does not have the authority to overrule the City ordinance's presumption of validity. See *Southern Bell Tel. & Tel. Co. v. City of Spartanburg,* 285 S.C. 495, 331 S.E.2d 333 (1985). The matter is now before this court on the issue of whether §1807 is contrary to law. See *S.C. Code §6-29-820; McMaster v. Columbia Bd. of Zoning Appeals*, 395 S.C. 499, 719 S.E.2d 660 (2011).

FACTS

§1807 creates an overlay zoning district named the Ocean Boulevard Entertainment Overlay District (OBEOD) for most of the original historic downtown area of the City. *Exhibit A*. The boundaries of the OBEOD are the Atlantic Ocean on the east, 6th Avenue South on the south, Chester Street (one block east of U.S. Highway Business 17) on the West, and 16th Avenue North on the north. The OBEOD is a narrow strip of land bordering the Atlantic Ocean. It encompasses two amusement zoning districts, a mixed use high density district, and a downtown commercial district. See *Exhibit A.*

City Council's purpose in creating the OBEOD was to establish a family friendly entertainment and retail land use, and encourage compatible land uses, ensure higher quality development and business uses and functions in order to protect property values and provide safe and efficient pedestrian and automobile access. *§1807 A. 8.* City Council found that certain retail offerings created an atmosphere that was repulsive to mothers and fathers in the care of their children, in that retail outlets are promoting crudity and sexually explicit apparel, drug paraphernalia, and consumables that mimic and promote drug and substance consumption. *§1807 A. 7.* City Council's findings are consistent with its comprehensive General Plan.[1]

[1] The family beach image needs to be encouraged and supported by all businesses. Negative national publicity about the congestion and behavior during motorcycle rallies hurts the family business. City image is very important to these banking representatives. Crime and the perception of crime is a problem that needs addressing such as beach and street robberies reported in the daily newspapers and on television. The panel discussed the problem with balancing the need to address crime without giving the image of becoming a police state. *Comprehensive General Plan 2011*

The following retail business uses are prohibited in the OBEOD:

1) Smoke shops and tobacco stores.

2) Retail merchandising of alternative nicotine, alternative nicotine delivery product, vapor product, e-cigarette, tobacco paraphernalia or cannabis products.

3) Retail merchandising of tobacco or tobacco products of more than an incidental nature.

4) Retail merchandising or display of sexually oriented merchandise, as defined herein. Any display of sexually oriented merchandise qualifies the retail operation as a sexually oriented business, which must be located in a permitted zone.

5) Providing space for a "barker" for a business not located at the premises.

§1807 D.

All of the Appellants are located in the OBEOD and their representative admitted they engaged in one or more of the prohibited uses in the OBEOD. [Tr. P. 78] Further the BZA found that based on the evidence presented all the appellants engaged in one or more of the prohibited uses in the OBEOD.

DISCUSSION

Standard of Review

Appellants have the burden of proof. The Appellants must prove that the City's rationale for creating the OBEOD is not even fairly debatable. If the City's rationale is fairly debatable, the OBEOD is valid. *Harbit v. City of Charleston,* 382 S.C. 383, 393, 675 S.E.2d 776, 781 (Ct. App. 2009), as amended (May 4, 2009). Zoning is a legislative act which will not be interfered with by the courts unless there is a clear violation of citizen's constitutional rights. In order to successfully assault a city's zoning decision, a citizen must establish that the decision was arbitrary and unreasonable. *Byrd, et al. v. City of North Augusta*, 261 S.C. 591, 201 S.E.2d 744 (1974). Courts have no prerogative to pass upon the wisdom of the municipality's decision unless such decision is "so unreasonable as to impair or destroy citizen's constitutional rights." *Hampton v. Richland County*, 292 S.C. at 503, 357 S.E.2d at 465 (Ct.App.1987)

[quoting *Rush v. City of Greenville*, 246 S.C. 268, 276, 143 S.E.2d 527, 531 (1965)]; and the decision should not be overturned by a court so long as the decision is "fairly debatable." Ibid. [quoting *Rushing v. City of Greenville*, 265 S.C. at 288, 217 S.E.2d at 799

Arguments

Appellants' main attack on §1807 is that the OBEOD prohibits uses that are allowed to businesses surrounding the OBEOD. In other words. Appellants claim the City's overlay zone constitutes illegal spot zoning. *Knowles v. City of Aiken*, 305 S.C. 219, 219–24, 407 S.E.2d 639, 639–43 (1991).

In *Talbot v. Myrtle Beach Board of Adjustment*, 222 S.C. 165, 72 S.E.2d 66 (1952), the South Carolina Supreme Court stated that where an ordinance establishes a small area within the limits of a zone in which are permitted uses different from or inconsistent with those permitted within the larger, such "spot zoning" is invalid where the ordinance does not form a part of a comprehensive plan of zoning or is for mere private gain as distinguished from the good of the common welfare. *Id.* However, with respect to judicial review of spot zoning issues, the Court also cautioned in *Talbot* that "Courts cannot become city planners but can only correct injustices when they are clearly shown to result from the municipal action." *Id.* Hence, in reviewing spot zoning issues, upon a finding that there was in fact spot zoning, the appropriate analysis is to closely scrutinize the following factors: (1) the adherence of the zoning to the City's comprehensive plan; and (2) promotion of the good of the common welfare but to only correct injustices which are clearly shown. *Knowles v. City of Aiken*, 407 S.E.2d at 642.

The OBED is an overlay zone which is a statutorily permitted zoning technique that is defined as a zone which imposes a set of requirements or relaxes a set of requirements imposed by the underlying zoning district when there is a special public interest in a particular geographic area that does not coincide with the underlying zone boundaries. *SC Code Ann. §6-29-720(C)(5)*. The City's special public interest is stated in the text of §1807. City Council expressly found the purpose of the OBEOD was to establish

a family friendly entertainment and retail land use, and encourage compatible land uses, ensure higher quality development and business uses and function in order to protect property values and provide safe and efficient pedestrian and automobile access. *§1807(8).* Such a purpose is legitimate. *Bellis Circle, Inc. v. City of Cambridge,* 86 Mass. App. Ct. 1105, 12 N.E.3d 1052 (2014).

At the request of the City, the Court takes judicial notice of portions of the City's Comprehensive General Plan. *Exhibit 2. . DiMattio v. Millcreek Township Zoning Hearing Board,* 147 A.3d 969 (Pa. Commw. Ct. 2016). The City's Comprehensive General Plan makes development of tourism in the original historic downtown area as one of its main features. One objective of the Comprehensive General Plan is to continue to define and maintain the City as a family beach. *Exhibit 2.*

The Court further takes judicial notice of the City of Myrtle Beach Downtown Master Plan March 2019 by Benchmark at the request of the City. *Exhibit 3. Id.* The plans show that revitalization of the original historic downtown area of the City is a major part of the City's general planning process. The provisions of §1807 do adhere to purposes of the zoning plans of the City since the City began focusing its attention on the original historic downtown area of the City in the 1990's.

The downtown master plan states the City's downtown is a unique fabric of historic properties. The downtown was once like any other downtown with department store style shopping offering all the goods and services available to support the community. Over time these uses moved out of the historic core to the US Highway 17 bypass and commercial shopping malls, leaving much of the historic shopping area vacant. At the same time, the ocean front of the City continued to develop and attracted amusement and entertainment uses to support a flourishing tourism industry. The OBEOD limits uses that are found by City Council to be contrary to the support of the flourishing tourism industry that is being developed in the original historic downtown area. *§1807 A. & Exhibit 2.* The Court finds that the provisions and purposes of the OBEOD are fairly debatable on promoting the public good of the original historic

downtown area of the City. The provisions and purposes of the OBEOD are harmonious to the flourishing tourism industry that is being developed to maintain the original historic downtown area as a family beach. *Town of Iva ex rel. Zoning Adm'r v. Holley,* 374 S.C. 537, 649 S.E.2d 108 (Ct. App. 2007).

City Council found that the limitations on retail offerings prevented an atmosphere that is repulsive to mothers and fathers in the care of their children, in that a growing number of retail outlets in the OBEOD are promoting crudity and sexually explicit apparel, drug paraphernalia, and consumables that mimic and promote drug and substance consumption. §1807 (7). City Council's finding is fairly debatable and consistent with studies and zoning ordinances around the United States. See *Bellis Circle, Inc. v. City of Cambridge,* 86 Mass. App. Ct. 1105, 12 N.E.3d 1052 (2014); Also See *Fla. Stat. Ann. § 569.0073 (West)*; "Local Land Use Regulation for the Location and Operation of Tobacco Retailers" by Randolph Kline Copyright © 2004 by the Tobacco Control Legal Consortium; "Local Strategies to Regulate Vape Shops & Lounges" September 2014, changelabsolutions.org/tobacco-control.

Appellants attack the City's choice of the particular geographic area where the OBEOD overlay zone is located. Appellants claim the OBEOD is bordered by several commercial businesses which are similar to the businesses limited in the particular geographic area where the OBEOD is located. In oral argument Appellants' attorney argued that the City's position would be stronger if the OBEOD covered the entire City. Appellants claim is that limiting the sale of certain items in a geographic area which borders on a geographic area which does not contain those same limitations is unfair and unconstitutional.

Appellants' claim lacks merit. Zones must have beginning and terminating points. If the existence of divergent uses across zone boundary lines were taken *per se* as an appropriate basis for a constitutional violation, the entire zone plan in any municipality might well crumble by chain reaction. *Scaduto v. Town of Bloomfield,* 127 N.J.L. 1, 4, 20 A.2d 649 (N.J. Sup. Ct. 1941); *Rexon v. Board of Adjustment of Borough of Haddonfield,* 10 N.J. 1, 9, 89 A.2d 233 (1952); *Ward v. Scott,* 11 N.J. 117, 128, 93 A.2d 385 (1952).

Izenberg v. Board of Adjustment of City of Paterson, 35 N.J. Super. 583, 114 A.2d 732, 736 (App. Div. 1955). See § 10:23.*Neighbor's greener pasture lawsuits,* 1 *Rathkopf's The Law of Zoning and Planning* § 10:23 (4th ed.).

The City contends that the interest of the public good for the location of the OBEOD is fairly debatable. The geographic area of the OBEOD is the original historic downtown area of the City. The boundaries of the OBEOD with one exception follows the boundaries of the Downtown Redevelopment District established in the 1990's. [Dep. Ken May p.7, l. 15-21] The exception is the western boundary of the OBEOD which mainly runs on Chester Street, one block south of the four lane highway U.S. Highway 17, Business. The one block separation acts as a buffer between the main commercial businesses along US Highway 17 Business and the historic downtown tourism area which experiences heavy pedestrian traffic. [Dep. Ken May p.26, l. 11-24] The reason for the choice of the geographic area is shown by the testimony of the Zoning Administrator Ken May who testified: "I can give you one item that I know was a true concern, and that was the display of the bongs and all that stuff that was out there on the streets whenever you got the pedestrian traffic such as the children." [Dep. Ken May p.26, l 11-24]

Appellants included a list of 17 shops similar to the ones regulated in the OBEOD which they claim border the OBEOD. However, the OBEOD map shows that only five of the listed shops border the western boundary of the OBEOD. All of those shops are located on U.S. Highway 17 Business which is mainly used by automobiles and those shops face toward the west. The shops inside the OBEOD shown on Appellants' map appear to be two streets over on Flagg Street facing toward the east. The remaining shops listed in Appellants' list of similar shops are located in other parts of the City. Appellants also list 55 Beachwear Stores and gas stations located all over the City and outside the OBEOD. Appellants have not shown that these shops would be affected by the definitions or limitations stated in the OBEOD if they

were located in the OBEOD. For example, the incidental sale of cigarettes is not prohibited in the OBEOD. However, a smoke shop as defined in §1807 is prohibited in the OBEOD.[2]

Appellants claim the arbitrary and capricious elements of the geographical boundaries are demonstrated in the testimony of Zoning Administrator. Appellants claim the Zoning Administrator could not answer questions about how the geographical boundaries were chosen. Appellants have mischaracterized the Zoning Administrator's testimony. Appellants' attorney asked the Zoning Administrator about why City Council made the choices it made when creating the OBEOD and its boundaries. The Zoning Administrator answered by referring the Appellants attorney to the minutes of the City Council meetings which speak for themselves. [Dep. Ken May p.24, l. 15-22; *passim*] The Zoning Administrator's deferral to City Council minutes was appropriate. See *Berkeley Elec. Co-op., Inc. v. Town of Mount Pleasant*, 308 S.C. 205, 417 S.E.2d 579 (1992) (parol evidence was improperly admitted to contradict minutes of town council which were complete and unambiguous on their face).

In addition, City Council's reasons for the creation of the OBEOD are clearly stated in the purpose and intent section of §1807 A of the City's zoning ordinance. For those reasons, the Court finds that reasonableness of the geographical boundaries of the OBEOD is fairly debatable and therefore valid. Courts have no prerogative to pass upon the wisdom of the municipality's zoning decisions. *Rush v. City of Greenville*, 246 S.C. 268, 276, 143 S.E.2d 527, 531 (1965).

CONCLUSION

The Court finds that Appellants have not met their burden of proving that the City's rationale for creating the OBEOD is arbitrary or capricious under the fairly debatable standard of review. The OBEOD is located in the heart of the original historic entertainment area of the City. The City's comprehensive

[2] SMOKE SHOP AND TOBACCO STORE. Any premises with more than an incidental display, sale, distribution, delivery, offering, furnishing, or marketing of alternative nicotine, alternative nicotine delivery product, vapor product, e-cigarette, single cigarette tobacco, tobacco products, or tobacco paraphernalia; provided however the incidental retail of commonly available packaged packs. cartons or boxes of cigarettes and cigars are not regulated herein. Incidental retail means accounting for Less than ten (10) % of the retail offerings.
§1807 Code of Ordinances.

plan calls for City Council to continue to define and maintain the City as a family beach. §1807 reasonably furthers that general purpose and it is in the interest of the City's public good.

NOW, THEREFORE, it is hereby

ORDERED, that the decision of the City of Myrtle Beach Board of Zoning Appeals is affirmed.

AND IT IS SO ORDERED.

Honorable Benjamin Culbertson
Presiding Judge 15th Judicial Circuit

April 22, 2021
Georgetown, South Carolina

Horry Common Pleas

Case Caption: Ani Creation Inc , plaintiff, et al VS Board Of Zoning Appeals City Of Myrtle Beach , defendant, et al

Case Number: 2020CP2600785

Type: Order/Other

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2020-CP-26-00785

ANI CREATION, INC. d/b/a Rasta; ANI CREATION, INC. d/b/a Wacky T's; BLUE SMOKE, LLC d/b/a Doctor Vape; BLUE SMOKE, LLC d/b/a Blue Smoke Vape Shop; ABNME, LLC d/b/a Best for Less; KORETZKY, LLC d/b/a Grasshopper; RED HOT SHOPPE, INC.; E.T. SPORTSWEAR, INC. d/b/a Pacific Beachwear; MYRTLE BEACH GENERAL STORE, LLC; I AM IT, INC. d/b/a T-Shirt King; and BLUE BAY RETAIL, INC. d/b/a Surf's Up,

Petitioners,

vs.

CITY OF MYRTLE BEACH BOARD OF ZONING APPEALS and KEN MAY, ZONING ADMININISTRATOR FOR CITY OF MYRTLE BEACH,

Respondents.

ORDER DENYING PETITONERS MOTION TO RECONSIDER

This matter came before the Court upon Petitioners' SCRP Rule 59 Motion to Reconsider its order affirming the Order of the Board of Zoning Appeals issued in connection with Petitioners' appeal of the City's application of §1807 Code of Ordinances for the City of Myrtle Beach to their businesses. After reconsidering its order and hearing oral arguments in a hearing held on September 8, 2021, the Court reaffirms its order finding that §1807 is a valid and constitutional municipal ordinance and its application to the Petitioners was proper. The Court denies Petitioners' Motion to Reconsider. Petitioner's attorney requested that each of its objections to the §1807 be addressed separately. The Court denies Petitioners' individual objections stated in their Motion to Reconsider for the following reasons:

Petitioners' Objections and Court Responses

1. The Court in its Order erred in failing to find that Section 1807 was unconstitutional because the term "family friendly" is not defined.

The Court rejects Petitioners' 1st objection. A family-friendly place is defined in a standard dictionary as a place where people with children are welcome. (Definition of family-friendly from the Cambridge Business English Dictionary © Cambridge University Press). The City's zoning ordinance states that definitions for other words or terms except those specifically defined herein shall be found in a standard dictionary. §201 Zoning Code City of Myrtle Beach, S.C. Family friendly is used as an adjective in §1807 and its definition is explained in the findings of the City by examples of uses that are not family friendly. Those examples should be easily understood and applied to Petitioners.

2. The Court erred in failing to hold that undefined terms such as "family friendly" in Section 1807 of the Ordinance are void for vagueness and thus was unconstitutional.

The Court rejects Petitioners' 2nd objection. Family friendly is used as an adjective in §1807 and its definition is explained in the findings of the City by examples of unpermitted uses that are not deemed family friendly in the OBEOD overlay zone. Those uses that are not permitted are easily understood and can be applied to Petitioners' uses that that violate the requirements in the overlay zone.

3. The Court erred in failing to hold Section 1807 of the Myrtle Beach City Ordinance was arbitrary and capricious in its application.

The Court rejects Petitioners' 3rd objection. The City's Board of Zoning Appeals found the application of §1807 was proper. A decision of a municipal zoning board can be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion." *Williams v. Lexington Cty. Bd. of Zoning Appeals*, 413 S.C. 647, 652, 776 S.E.2d 749, 751–52 (Ct. App. 2015). The Court finds that the Petitioners admitted at the appeal hearing that they violated §1807. Therefore the application of §1807 to Petitioners was not arbitrary or capricious. The BZA did not determine whether §1807 was constitutional or violated State law.

4. The Court erred in failing to find the use of the term "family friendly" in City of Myrtle Beach Zoning Ordinance 1807 is undefined and does not give Appellants and others meaningful notice of the meaning of

those terms which makes the Ordinance arbitrary and capricious.

The Court rejects Petitioners' 4th objection. The business uses applicable to Petitioners that are regulated in the OBEOD are listed individually and those uses are properly defined in §§1807 C, D of the zoning ordinance.

5. The Court's Order does not consider evidence submitted by Appellants including the Affidavit of Carl Sivertsen in which he testified that he was a member of the Myrtle Beach Board of Zoning Appeals and voiced objections to Myrtle Beach Ordinance § 1807 because it was unconstitutional.

The Court rejects Petitioners' 5th objection. The issue of whether §1807 is constitutional is a question of law. Mr. Silverstein's stated affidavit opinions as to matters of law are not binding or precedential authority for this Court. S.C. Code Ann. §14-8-200; *Gilmer v. Martin,* 323 S.C. 154, 158, 473 S.E.2d 812, 814 (Ct. App. 1996)

6. The Court erred in failing to find that the OBEOD district was arbitrary and capricious and could not pass Constitutional muster. The reason being that merchants just outside of the OBEOD district could sell the same products while individual merchants inside the OBEOD district could not sell those same products.

The Court rejects Petitioners' 6th objection. Zones must have beginning and terminating points and if the existence of divergent uses across zone boundary lines were taken per se as an appropriate basis for a constitutional violation, the entire zone plan in any municipality might well crumble by chain reaction. *Scaduto v. Town of Bloomfield,* 127 N.J.L. 1, 4, 20 A.2d 649 (N.J. Sup. Ct. 1941); *Rexon v. Board of Adjustment of Borough of Haddonfield,* 10 N.J. 1, 9, 89 A.2d 233 (1952); *Ward v. Scott,* 11 N.J. 117, 128, 93 A.2d 385 (1952). *Izenberg v. Board of Adjustment of City of Paterson,* 35 N.J. Super. 583, 114 A.2d 732, 736 (App. Div. 1955). See § 10:23.Neighbor's greener pasture lawsuits, *1 Rathkopf's The Law of Zoning and Planning § 10:23 (4th ed.)* The Court finds that the fact that merchants just outside of the OBEOD district could sell the same products while individual merchants inside the OBEOD district could not sell those same products does not make §1807 arbitrary and capricious or unconstitutional.

7. The Court erred in failing to consider the testimony of Ken May that the products that were banned do not create a public safety problem in the OBEOD district.

The Court rejects Petitioners' 7th objection. "An abuse of discretion occurs when the Court's decision is unsupported by the evidence or controlled by an error of law." *Cnty. of Richland v. Simpkins,* 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct.App.2002). The Court finds the evidence in the ordinance supports a finding that it is fairly debatable whether the regulating retail merchandising of alternative nicotine, alternative nicotine delivery product, vapor product, e-cigarette, tobacco paraphernalia or cannabis products and sexually oriented material, as defined in §1807, in a zoning district that is created to attract families and minors affects public safety or whether the ordinance has a reasonable relation to a lawful purpose. The Court finds the ordinance passes constitutional muster. See *Newton v. Zoning Bd. of Appeals for Beaufort Cty.*, 396 S.C. 112, 116, 719 S.E.2d 282, 284 (Ct. App. 2011).

8. The Court erred in upholding City of Myrtle Beach Ordinance 1807(a)(I0). The error being there was no testimony of a safety or public health crisis created by the sale of those products (cigarettes, CBD oil and pipes) in the OBEOD district.

For the same reasons set forth in ¶ 7 above, the Court rejects Petitioners' 8th objection.

9. The Court erred in holding the OBEOD district and its lines were drawn in a constitutional fashion. The error being there is no rhyme or reason to the current OBEOD boundaries. (See Sivertsen Affidavit and photos of businesses who sell the same products outside the OBEOD District.)

The Court rejects Petitioners' 9th objection. The Court finds the justification for the creation of the OBEOD is stated in the text of the zoning ordinance. The district is the City's historical entertainment district where families park in a public garage and families visit the area with their children. The historical district encompasses the City's public boardwalk, the former pavilion site and Family Kingdom, numerous family friendly gift shops and other entertainment venues attractive to minors. The purpose of the zoning ordinance is to regulate the sale and advertisement of merchandise that could be harmful to minors and families.

10. The Court erred in finding there were undesirable impacts to the public economy. The error being that there was no opinion or expert testimony offered that the sale of products such as cigarettes, CBD oil, pipes and cigarette accessories caused damage to the public economy.

The Court rejects Petitioners' 10th objection. A municipal ordinance is a legislative enactment and is presumed to be constitutional." *Town of Scranton v. Willoughby*, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1992). Every presumption will be made in favor of the constitutionality of a legislative enactment; and a statute will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution. The power to declare an ordinance invalid because it is so unreasonable as to impair or destroy constitutional rights is one which will be exercised carefully and cautiously, as it is not the function of the Court to pass upon the wisdom or expediency of municipal ordinances or regulations. *Rush v. City of Greenville*, 246 S.C. 268, 276, 143 S.E.2d 527, 531 (1965); *McMaster v. Columbia Bd. of Zoning Appeals*, 395 S.C. 499, 504–05, 719 S.E.2d 660, 662–63 (2011). Since ordinances are accorded a presumption of constitutionality, the attacking party has the burden of overcoming. *Southern Bell Tel. & Tel. Co. v. City of Spartanburg,* 285 S.C. 495, 331 S.E.2d 333 (1985); *North Charleston Land Corp. v. City of North Charleston*, 281 S.C. 470, 316 S.E.2d 137 (1984); *Rush v. City of Greenville*, 246 S.C. 268, 143 S.E.2d 527 (1965). The Court finds that the retail merchandising of the products regulated in §1807 could have undesirable impacts to the public economy inside the OBEOD. The Court finds that the negative impact of merchandising alternative nicotine, alternative nicotine delivery product, vapor product, e-cigarette, tobacco paraphernalia or cannabis products and sexually oriented material, as defined in §1807, on businesses in a zoning overlay district established to attract families and minors is fairly debatable.

11. The Court erred in failing to consider the testimony of Ken May (the Zoning Administrator) who testified there was no evidence that the sale of these products in the OBEOD District affected real property prices. (See Dep. of May, p. 34, lines 19-22 in the record.)

The Court rejects Petitioners' 11th objection. Since ordinances are accorded a presumption of constitutionality, the attacking party has the burden of overcoming. *Southern Bell Tel. & Tel. Co. v. City of*

***Spartanburg*, 285 S.C. 495, 331 S.E.2d 333 (1985). While Mr. May testified that he had no evidence that the sale of these products in the OBEOD District had any effect on property, he also testified that the sale of the prohibited products easily could have an effect on the property. The Court finds that the property issues addressed in the OBEOD District are "fairly debatable" and Petitioners have not met their burden of proving that the ordinance is arbitrary or capricious.**

12. The Court erred in finding there was evidence that sale of these products was creating a safety issue. (See Depo. of May, p. 34, lines 22-25; p. 35, lines 1-5 in the record).

The Court rejects Petitioners' 12th objection. Since ordinances are accorded a presumption of constitutionality, the attacking party has the burden of overcoming. *Southern Bell Tel. & Tel. Co. v. City of Spartanburg*, 285 S.C. 495, 331 S.E.2d 333 (1985). The Court finds the unsafe atmosphere appearances addressed in the OBEOD District are "fairly debatable" and Petitioners have not met their burden of proving that the ordinance is arbitrary or capricious.

13. The Court erred in failing to find that the Ordinance, specifically 1807 of the City of Myrtle Beach Zoning Ordinance was arbitrary and capricious because the term "unseemliness" is undefined in the Ordinance.

The Court rejects Petitioners' 13th objection. The City's zoning ordinance states that definitions for other words or terms except those specifically defined herein shall be found in a standard dictionary. §201 Zoning Code City of Myrtle Beach, S.C. Meriam-Webster Dictionary contains the definition of unseemly. It defines unseemly as a) not according with established standards of good form or taste or b) not suitable for time or place. The Court finds it is fairly debatable whether the merchandise regulated in §1807 is suitable for families and minors.

14. The Court erred in finding that the Ordinance was properly noticed and approved by City Council.

The Court rejects Petitioners' 14th objection. Ordinances are accorded a presumption of constitutionality and Petitioners have the burden of proof on procedural issues of notice and manner of approval. Petitioners' have not met their burden of proof in connection with their procedural due process claims.

15. The Court erred in prohibiting the sale of t-shirts with sexual slogans as being offensive since this violates the First Amendment. (See *Rosenberger v. Rector and Visitors of the University of Virginia*, 519 U.S. 819

(1995).

The Court rejects Petitioners' 15th objection. The City did not prohibit the sale of t-shirts with sexual slogans throughout the City when enacting §1807. The City regulated through its zoning ordinance the sale of sexually oriented merchandise in the OBEOD. Sexually oriented merchandise is defined in the ordinance as any merchandise which graphically or by symbol or symbols depicts, describes, portrays, pictures by way of realistic, naturalistic or cartoonish representation human or animal sexual activities or specified anatomical parts. This shall include any depiction or description, by pictorial representation or language, of any sexual intercourse; masturbation; sadomasochistic abuse; sexual penetration with an inanimate object; sodomy; bestiality; uncovered genitals, buttocks, or female breast; defecation or urination; covered genitals in an obvious state of sexual stimulation or arousal; or the fondling or other erotic touching of genitals, the pubic region, buttocks or female breasts, or merchandise of that subject.

The Court finds that the regulation of retail merchandising of sexually oriented merchandise inside the OBEOD while allowing such merchandise to be sold elsewhere in the City is a reasonable time, place and manner regulation of sexually oriented merchandise. *Centaur, Inc. v. Richland Cty.*, 301 S.C. 374, 381, 392 S.E.2d 165, 169 (1990).

16. The Court erred in failing to find that the City of Myrtle Beach was engaged in illegal spot zoning.

The Court rejects Petitioners' 16th objection. In *Talbot v. Myrtle Beach Board of Adjustment*, 222 S.C. 165, 72 S.E.2d 66 (1952), the SC Supreme Court stated that where an ordinance establishes a small area within the limits of a zone in which are permitted uses different from or inconsistent with those permitted within the larger, such "spot zoning" is invalid where the ordinance does not form a part of a comprehensive plan of zoning or is for mere private gain as distinguished from the good of the common welfare. However, with respect to judicial review of spot zoning issues, the Court also cautioned in Talbot that "Courts cannot become city planners but can only correct injustices when they are clearly shown to result from the municipal action."

The Court finds §1807 creates an overlay zoning district named the Ocean Boulevard Entertainment District (OBEOD) for most of the original historic downtown area of the City. The

boundaries of the OBEOD are the Atlantic Ocean on the east, 6th Avenue South on the south, Chester Street (one block east of U.S. Highway Business 17) on the West, and 16th Avenue North on the north. The OBEOD borders the Atlantic Ocean. It encompasses two amusement zoning districts, a mixed use high density district, and a downtown commercial district. The OBEOD is not a small area within the limits of a zone. It includes several different zoning districts. The uses regulated in the OBEOD in § 1807 were anticipated in the City's Comprehensive General Plan and they are consistent with it. The Court finds that §1807 does not constitute "spot zoning."

17. The Court erred in failing to find that Section 1807 of the Myrtle Beach City Ordinances could not ban protected speech, i.e., t-shirts for sale of a sexual nature.

The Court rejects Petitioners' 17th objection. See response in ¶15 above.

18. The Court erred in failing to find that the OBEOD Ordinance (Section 1807) had no rational basis. The error being that the products that are banned in the OBEOD district are sold citywide as shown by the various photographs of those products in over 55 beachwear stores and 17 other locations.

The Court rejects Petitioners' 18th objection. The Court finds that the City had a rational basis for enacting §1807. The rational basis for enacting §1807 is set forth in the purpose and intent section of the ordinance. See §1807 A. Code of Ordinances.

19. The Court erred in failing to find Section 1807 of the City of Myrtle Beach Zoning Ordinances is illegal and that the Ordinance is viewpoint discrimination (as to the t-shirts) which is an egregious form of content discrimination and presumptively unconstitutional.

The Court rejects Petitioners' 19th objection. See response in ¶15 above.

20. The Court erred in failing to hold the Ordinance was unconstitutional because it falls under the preemption doctrine. Specifically, the City cannot enact laws which conflict with the Constitution or general laws of the State of South Carolina. In this case, the City has outlawed or restricted sale of CBD oil, tobacco, t-shirts with messages on them, pipes, bongs, rolling papers in a specific area of the City while those same products are readily available in the rest of the City and throughout South Carolina.

The Court rejects Petitioners' 20th objection. Article VIII, § 14(5), of the South Carolina Constitution

requires statewide uniformity of general law provisions regarding "criminal laws and the penalties and sanctions for the transgression thereof. Accordingly, local governments may not criminalize conduct that is legal under a statewide criminal law. *Connor v. Town of Hilton Head Island,* 314 S.C. 251, 442 S.E.2d 608 (1994) *Martin v. Condon*, 324 S.C. 183, 478 S.E.2d 272, 274 (1996). Although Ordinance §1807 provides criminal penalties for its violation, it does not criminalize the sale of the products listed in Petitioners' exceptions. §1807 merely provides criminal penalties for violation of provisions of the City's zoning ordinance. So long as businesses comply with the requirements of the City's zoning ordinances, they may operate their businesses in the OBEOD. See *Bugsy's, Inc. v. City of Myrtle Beach,* 340 S.C. 87, 90–98, 530 S.E.2d 890, 891–95 (2000). State law does not preclude the City from passing zoning ordinances which impact businesses that sell the products listed in Petitioners' exceptions. For example, State regulates of the sale of beer, wine, and alcohol, but the State's regulation does not preclude a municipality from passing a zoning ordinance which impacts where a business may sell those products. ***Id.***

21. The Court erred in failing to consider the case of *Safeway, Inc. v. City of San Francisco*, 797 F. Supp. 2d 964, 973 (N.D. Cal. 2011) and *Walgreen Co. v. City and County of San Francisco*, 185 Cal. App. 4th 424 (2010) in which the court struck down a tobacco retail licensing program prohibiting pharmacies from selling tobacco but exempting grocery stores and big box store with pharmacies from selling the same tobacco product in the City of San Francisco.

The Court rejects Petitioners' 21st objection. The Court finds that the above cases cited by Petitioners are distinguishable factually and those case rulings are not applicable to the zoning issues in the present lawsuit.

22. The Court erred in failing to find that the OBEOD Zoning Ordinance violated the South Carolina Supreme Court's rule on spot zoning in *Talbot v. Myrtle Beach Board of Adjustment*, 222 S.C. 165, 72 S.E.2d 66 (1952).

The Court rejects Petitioners' 22nd objection. See response in ¶16 above.

23. The Court erred in failing to grandfather Appellants' businesses that had sold these products for

many years and that the failure to grandfather Appellants' businesses was a taking and was unconstitutional as a matter of law.

The Court rejects Petitioners' 23rd objection. The Court finds that § 1807 properly amortized the commercial uses claimed by Petitioners. *Centaur, Inc. v. Richland Cty.*, 301 S.C. 374, 381, 392 S.E.2d 165, 169 (1990). Further, the Court finds that Petitioners have not offered any evidence to challenge the amortization provisions of the ordinance.

24. The Court erred in regard to its determination of the standard of review. The error being the standard of review is whether the decision of the Board is correct as a matter of law. S.C. Code § 6-29-80. See *City of Rock Hill v. Harris*, 391 S.C. 149, 705 S.E2d 53 (2011).

The Court rejects Petitioners' 24th objection. The Court finds that it must leave the City's decision undisturbed if the propriety of that decision is even "fairly debatable." *Rushing v. City of Greenville*, 265 S.C. 285, 288, 217 S.E.2d 797, 799 (1975); *Hampton v. Richland County*, 292 S.C. 500, 503, 357 S.E.2d 463, 465 (Ct.App.1987), cert. denied, 296 S.C. 72, 370 S.E.2d 714 (1988). The Court finds that the propriety of §1807 is fairly debatable.

Petitioners cite the case of *City of Rock Hill v. Harris*, 391 S.C. 149, 705 S.E2d 53 (2011). The Court finds that case is not applicable to the zoning issues in the present lawsuit.

25. The Court erred in finding there is a rational relationship between the Ordinance (Section 1807) and the fact that certain products were only banned in one area of the City while being freely sold in other areas of the City.

The Court rejects Petitioners' 25th objection. See the Court's response in ¶6.

NOW THEREFORE, for the reasons stated hereinabove Petitioners Motion for Reconsideration is hereby denied and Petitioners' appeal is dismissed with prejudice.

September ____, 2021

Honorable Benjamin Culbertson
Presiding Judge 15th Judicial Circuit

Horry Common Pleas

Case Caption: Ani Creation Inc , plaintiff, et al VS Board Of Zoning Appeals City Of Myrtle Beach , defendant, et al

Case Number: 2020CP2600785

Type: Order/Other

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148