

H

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

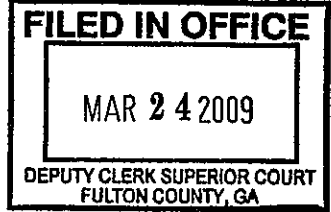
10950 RETAIL, LLC, d/b/a Love
Shack,

Petitioner,

vs.

CITY OF JOHNS CREEK, et al.,

Respondents.



Civil Action No.2007CV142924

FINAL ORDER

The above-captioned matter is presently before the Court on Petitioner's motion for partial summary judgment. Respondent opposes the motion. On March 2, 2009, the Court held a hearing concerning the instant motion. For the reasons set forth below, the instant motion is **GRANTED**, Count One (1) of the above-captioned petition is decided in favor of Petitioner,¹ and the above-captioned case is **CLOSED**.

I. BACKGROUND

Petitioner operates a retail store that stocks and displays clothing, merchandise and media. (Compl. ¶ 23; Answer ¶ 23.) In 2007, Petitioner applied to erect two signs and one banner at its store. (Compl. ¶¶ 2, 24-25; Answer ¶ 2, 24-25.) By letter dated August 3, 2007, Respondent Sam Bishop ("the Director"),

¹ The Court notes that the instant motion relates solely to Count One (1) of the second amended above-captioned petition, wherein Petitioner asserts that Respondent City of Johns Creek, through its Board of Zoning Appeals ("BZA"), misapplied its sign ordinance in denying Petitioner's sign and banner permit applications. In this regard, on March 13, 2009, Petitioner filed an amendment to the second amended petition, voluntarily dismissing without prejudice counts two (2) through six (6) of the amended above-captioned petition.

who served as Senior Planner for Respondent City of Johns Creek Community Development, informed Petitioner that its sign-permit applications (submitted on June 14) and banner-permit application (submitted on July 5) had been denied because "the purported business owner ha[d] been denied an Occupational Tax Certificate for the location," and "it is therefore not appropriate to issue a sign permit for this location." (See Compl. ¶¶ 26-27; Original Compl., Ex. B.) Nothing in Article 33 of Respondent City of Johns Creek's Code of Ordinances ("the Sign Ordinance") was cited or relied on by the Director in his denial letters. (Id.)

Petitioner appealed from the Director's denial decisions. (Id., Ex. C.) The BZA affirmed the denial. (Id., Ex. D.) Following the BZA's decision, Petitioner timely perfected a petition for writ of certiorari with this Court.

II. DISCUSSION

A. Standard of Review

When entertaining a writ of certiorari, "[t]he appropriate standard of review to be applied to issues of fact ... is whether the decision below was supported by any evidence." City of Atlanta Gov't v. Smith, 228 Ga. App. 864, 865 (1997). Of course "any evidence" means competent or admissible evidence. See Guntharp v. Cobb County, 168 Ga. App. 33, 35 (1983). Regarding issues of law, the Court must review whether the lower

tribunal "(1) acted beyond the scope of its discretionary powers; (2) abused its discretion; [or] (3) ... acted in an arbitrary or capricious manner." Jackson v. Spalding County, 265 Ga. 792, 794 (1995)(citing O.C.G.A. § 5-4-12).

The Court's function is not only to determine if the lower tribunal's interpretation of the ordinances was reasonable, its obligation is to construe the ordinances as a matter of law. See Northside Corp. v. City of Atlanta, 275 Ga. App. 30, 31 (2005). Where, as here, the error complained of presents a question of law, if "the court is satisfied that there is no question of fact involved which makes it necessary to send the case back for a new hearing before the tribunal below, it shall be the duty of the judge of the superior court to make a final decision in the case without sending it back to the tribunal below." O.C.G.A. § 5-4-14(b); see also Longshore v. Collier, 37 Ga. App. 450, 452 (1927).

B. Merits of the Instant Motion

1. The Denials were Not Based on Permissible Criteria

Respondent City of Johns Creek must review and decide sign-permit applications based on the standards set forth within the four corners of the Sign Ordinance. See Café Erotica of Fla., Inc. v. St. Johns County, 360 F.3d 1274, 1284-85 (11th Cir. 2004) ("[T]he Constitution requires that [the county] establish neutral criteria to insure that the licensing decision is not based on the content or viewpoint of the speech being

considered. Such criteria should be expressly included within the [c]ounty's sign Ordinance, and should set forth specific content-neutral grounds under which a sign permit may be denied.") (citation and internal quotation marks omitted); accord Union City Bd. of Zoning Appeals v. Justice Outdoor Displays, 266 Ga. 393, 402 (1996) ("[The city's] regulation extends beyond this limitation without establishing that the restriction is 'narrowly tailored to protect some vital government interest.' Accordingly, the trial court did not err in finding that the provision of the [the city] Sign Ordinance that prohibits obscene, indecent or immoral speech is unconstitutionally overbroad and vague.") (citations omitted). Indeed, Respondent City of Johns Creek cannot deny a sign permit application for reasons that are not objectively and narrowly expressed in its prior-restraint scheme. See Café Erotica of Fla., Inc., 360 F.3d at 1284 ("[T]he Ordinance still fails to address our primary concern - that there be 'reasonably specific and objective' grounds for denying a permit application that are 'narrowly drawn, reasonable, and definite' so as to sufficiently reduce the potential for content-based decisionmaking."). Here, when the City denied Petitioner's applications, it reasoned that it was "not appropriate" to issue the permits because Petitioner was denied a business license. However, because the subject ordinance does not require that an applicant possess a business

license to obtain a sign or banner permit, this was not a permissible basis upon which to deny the applications.

2. The Post-hoc Grounds are Impermissible Criteria

At oral argument, the Respondent City of Johns Creek acknowledged that the cited basis for denying the applications, Petitioner's lacked an occupational tax certificate (i.e., business license), is not a proper basis for denying sign applications. In this regard, Respondent City of Johns Creek has offered the Court new grounds for denying the applications, namely, that: (1) Petitioner was not in compliance with the requirements of the zoning district; (2) Petitioner's business was illegal; (3) it could not issue permit to an entity that was not a business; and (4) the banner permit failed to comply with Section 8 of the Sign Ordinance because it lacked "proof that the owner of the lot [gave] express permission for the location of a sign on the property." However, none of these grounds were articulated in the Director's August 3 denial letters.

Despite Respondent City of Johns Creek's contentions and arguments, its post-hoc grounds do not support the denial decisions. First, there was no evidence tendered during the public hearing to support these allegations. Second, if the Court were to allow Respondent City of Johns Creek to proffer new grounds in support of the denials, due process problems emerge. In this regard, a basic requirement of due process "is the opportunity to be heard and it is an 'opportunity which must

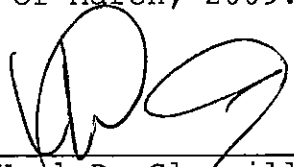
be granted at a meaningful time and in a meaningful manner.’” Parratt v. Taylor, 451 U.S. 527, 540 (1981) (citations omitted); Greene v. McElroy, 360 U.S. 474, 496 (1959) (“[w]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government’s case must be disclosed to the individual so that he has an opportunity to show that it is untrue.”); cf. Jackson v. Spalding County, 265 Ga. 792 (1995). Indeed, Respondent City of Johns Creek did not notice Petitioner that it was denying the applications based on these new grounds.

Finally, the subject ordinance mandates that the Director articulate the grounds upon which a denial is based. See Sign Ordinance § 9(B) (“If the decision of the Director is to deny the application, the decision shall state the grounds upon which the denial is based.”). As such, to allow Respondent City of Johns Creek to proffer new grounds at the BZA hearing or in the above-captioned matter that it did not assert in the Director’s letter violates the subject ordinance. Therefore, given the importance § 9(B) plays in the appeal process, it is arbitrary for Respondent City of Johns Creek to violate that section.

III. CONCLUSION

For the reasons set forth above, the instant motion is GRANTED, Count One (1) of the above-captioned petition is decided in favor of Petitioner, and the above-captioned case is CLOSED.

SO ORDERED this 16th day of March, 2009.



Ural D. Glanville, Judge
Superior Court of Fulton County
Atlanta Judicial Circuit

Copies to:

Dana K. Maine
100 Galleria Parkway, Suite 1600
Atlanta, GA 30339

Cary S. Wiggins
260 Peachtree Street NW, Suite 401
Atlanta, GA 30303