Rel: August 30, 2019

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2019

2180042

Hadi Store, LLC

v.

City of Tuscaloosa

Appeal from Tuscaloosa Circuit Court
(CV-18-900722)

THOMPSON, Presiding Judge.

Hadi Store, LLC ("Hadi"), appeals from a judgment of the Tuscaloosa Circuit Court ("the circuit court") upholding a decision by the City of Tuscaloosa ("the city") to deny Hadi's application for a license to sell liquor at a certain location

in an area of Tuscaloosa known as "West End," which apparently is a predominantly African-American community. Hadi had applied for a "lounge retail liquor-Class II (Package)" license to operate a package store. Under such a license, alcohol could not be consumed on the premises.

The Tuscaloosa City Council ("the council") held a hearing on Hadi's application over two sessions. At those sessions, the council heard from a number of people regarding different concerns they had that would be affected by the issuance of a liquor license. Officer Burkholter[1] of the Tuscaloosa Police Department ("TPD") testified to the number and types of calls TPD received concerning the area near Hadi in the approximately 18 months preceding the council's final hearing. Officer Burkholter said that Hadi would be in a "high crime area." The report he made of incidents in the quarter-mile radius around Hadi in the 18-month period he reviewed indicated that at least 42 of the scores of criminal offenses that had occurred in the area were alcohol related. Studies were presented indicating the adverse effects of

[1]Officer Burkholter's name is sometimes spelled "Burkhalter" in the record. Officer Burkholter's first name does not appear in the record.

alcohol stores in urban areas, especially stores targeting the African-American community. A West End resident presented a petition signed by approximately 200 neighbors stating that they did not want or need another liquor store in the area. A spokesman from Stillman College, which is close to Hadi, told the council that the college had concerns for its students because Hadi would be within close walking distance of the campus. Two others spoke out against granting the license, saying an additional liquor store in the vicinity was contrary to the community-development plan being implemented in the West End. That plan was intended to revitalize the area. One of those people, Serena Fortenbury, pointed out that there are many elementary schools, churches, and parks in the area. She said that she rarely saw children playing at a park one block from Hadi, but that she saw adults drinking alcohol in the park. There is also an alcohol- and drug-rehabilitation facility one block from Hadi.

Community leaders, including city councilors, the city's mayor, and the representative of Stillman College, opined that an additional liquor store in the West End would be detrimental to the attempts to revitalize the area or that it

would endanger the health, safety, and welfare of the city's residents.

The council denied Hadi's application for a liquor license. Hadi appealed the denial to the circuit court. In addition to considering the record created during the council meetings, the circuit court held a hearing during which it took testimony from two witnesses on behalf of Hadi. On August 17, 2018, the circuit court entered a judgment affirming the council's decision to deny Hadi's application. Specifically, the circuit court determined that the council's decision was not arbitrary and capricious and that the evidence indicated that granting the license to Hadi would create a nuisance and/or "circumstances clearly detrimental to adjacent residential neighborhoods or the public health, safety, and welfare." Hadi did not file a postjudgment motion.

Hadi appealed the circuit court's judgment to the Alabama Supreme Court, which determined that this matter was within the original appellate jurisdiction of this court. The supreme court transferred the appeal to this court pursuant to § 12-3-10, Ala. Code 1975.

On appeal, the parties first debate the issue of the proper standard of judicial review applicable in this matter. Hadi contends that the proper standard of judicial review of the denial of a liquor license is de novo. On the other hand, the city asserts that the ore tenus standard of review applies and that a presumption of correctness attaches to the council's act of denying Hadi's application.

This matter is governed by Act No. 98-342, Ala. Acts 1998, ("the Act"), a local act which superseded § 28-1-7, Ala. Code 1975, to the extent that that statute applied to the city.[2] Section 28-1-7(c) provides, in pertinent part, that a circuit court's review of a municipal governing body's denial of an application for a liquor license "shall be expedited de novo proceedings, heard by a circuit judge without a jury who shall consider any testimony presented by the city governing body and any new evidence presented in explanation or contradiction of the testimony." (Emphasis added.) Regarding judicial review, the Act is essentially identical to § 28-1-7,

[2]The text of the Act can be found in the Code Commissioner's Notes regarding § 28-1-7.

except that it omits the term "de novo." The Act reads, in pertinent part:

> "Proceedings in circuit court to review an action of a municipal governing body denying approval of a license application shall be expedited proceedings, heard by a circuit judge without a jury who shall consider any testimony or matters presented to the city governing body and any new evidence presented in explanation or contradiction of the same."

Act No. 98-342, § 3.

We look to the rules of statutory construction for guidance in determining the effect of the omission of the phrase "de novo" from the provision of the Act regarding judicial review.

> "'The intent of the Legislature is the polestar of statutory construction.' Siegelman v. Alabama Ass'n of Sch. Bds., 819 So. 2d 568, 579 (Ala. 2001) (citing Richardson v. PSB Armor, Inc., 682 So. 2d 438, 440 (Ala. 1996); Jones v. Conradi, 673 So. 2d 389, 394 (Ala. 1995); and Ex parte Jordan, 592 So. 2d 579, 581 (Ala. 1992)). We are mindful that 'the Legislature will not be presumed to have done a futile thing in enacting a statute; there is a presumption that the Legislature intended a just and reasonable construction and did not enact a statute that has no practical meaning.' Weathers v. City of Oxford, 895 So. 2d 305, 309 (Ala. Civ. App. 2004) (citing Ex parte Watley, 708 So. 2d 890 (Ala. 1997), and Ex parte Meeks, 682 So. 2d 423 (Ala. 1996)).
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> "The Court of Appeals of North Carolina has stated:

> "'[I]f the legislature deletes specific words or phrases from a statute, it is presumed that the legislature intended that the deleted portion should no longer be the law. See, e.g., Joe v. Lebow, 670 N.E.2d 9, 19 (Ind. Ct. App. 1996) ("When a statute contains language which is deleted by the legislature, we presume that the legislature intended the deletion to represent a change in the law."); State v. Eversole, 889 S.W.2d 418, 425 (Tex. App. 1994) ("[W]hen the legislature amends a particular statute and omits certain language of the former statute in its amended version, the legislature specifically intended that the omitted portion is no longer the law. Every word excluded from a statute must be presumed to have been excluded for a reason.").'

"Nello L. Teer Co. v. North Carolina Dep't of Transp., 175 N.C. App. 705, 710-11, 625 S.E.2d 135, 138 (2006).

"In Nello L. Teer Co., the North Carolina Court of Appeals concluded that the North Carolina legislature intended to change a law by deleting a phrase North Carolina courts had previously relied upon. The appellant in Nello L. Teer Co. argued that, according to § 136-29, N.C. Gen. Stat., filing a verified complaint within a specified period of time was a condition precedent to pursuing an action against a certain North Carolina state agency. 175 N.C. App. at 707-11, 625 S.E.2d at 137-38. North Carolina courts had previously held that, pursuant to specific language in § 136-29, filing a verified complaint within the specified period was a condition precedent to pursuing an action against that agency. 175 N.C. App. at 709, 625 S.E.2d at 138. However, the North Carolina legislature had amended § 136-29 by deleting the specific language that the courts had previously relied upon. Id.

Thus, the Nello L. Teer Co. court concluded that the legislature, by deleting the phrase previously relied upon, intended to change the law to remove that condition precedent. Id.; see also Grigerik v. Sharpe, 247 Conn. 293, 721 A.2d 526 (1998) (concluding that the Connecticut legislature's deleting certain statutory language that Connecticut courts had previously relied upon evidenced the legislature's intent to change the law); Dix v. Superior Court, 53 Cal. 3d 442, 461-62, 807 P.2d 1063, 1073, 279 Cal. Rptr. 834, 844 (1991) ('We presume the Legislature intends to change the meaning of a law when it alters the statutory language ..., as for example when it deletes express provisions of the prior version .... Because the Legislature is presumed [to be] aware of prior judicial constructions of a statute, the inference of altered intent is particularly compelling when, as in this case, the omitted word or phrase was significant to such a construction.'); and United States v. NEC Corp., 931 F.2d 1493, 1502 (11th Cir. 1991) (concluding that '[w]here, as here, the legislature deletes language that contained a general prohibition and replaces it with a grant of jurisdiction followed by certain enumerated exceptions, it is logical for a court to conclude that Congress intended to do away with the general prohibition').

"Regarding the case now before us, the legislature in amending § 36-26-100 in 2002 explicitly included within the purview of the FDA [Fair Dismissal Act, § 36-26-100 et seq., Ala. Code 1975] employees who had previously been explicitly excluded under that statute, i.e., production workers at the Alabama Industries for the Blind and employees at educational and correctional institutions under the control of the Alabama Department of Youth Services. Furthermore, the title to Act No. 2002-508, which amended § 36-26-100, specifically states that the purpose of the amendment was to include within the purview of

> the FDA the above-described employees who were previously excluded. Thus, the legislature's intent is evident both in the title to Act No. 2002-508 and in the language of the amended statute: to broaden the scope of employees who are covered under the FDA.
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> "Moreover, the legislature deleted the phrase 'or other state statute,' the very phrase our supreme court relied upon in Stephenson[v. Lawrence County Board of Education, 782 So. 2d 192 (Ala. 2000),] to conclude that the employee in that action was not covered under the FDA. That deletion is not a futile act. See Weathers, supra. It is purposeful. See, e.g., Nello L. Teer Co., supra; Grigerik, supra. It was intended to change the law to eliminate that restriction previously relied upon in Stephenson. Consequently, we conclude that the legislature intended that the FDA would govern dismissals of employees as defined under the FDA even though the dismissal of such employees is covered under some 'other state statute.'"

Glass v. Anniston City Bd. of Educ., 957 So. 2d 1143, 1147-48 (Ala. Civ. App. 2006).

> "'It is a general rule that the courts may not, by construction, insert words or phrases in a statute, or supply a casus omissus by giving force and effect to the language of the statute when applied to a subject about which nothing whatever is said, and which, to all appearances, was not in the minds of the legislature at the time of the enactment of the law. Under such circumstances, new provisions or ideas may not be interpolated in a statute, or ingrafted thereon. In this respect, it has been declared that it is not the office of the court to insert in a statute that which has been omitted, and that what the

> legislature omits, the courts cannot supply. These rules have been regarded as applicable to an unintentional omission.
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> "'Words and phrases may, however, be supplied by the court and inserted in a statute, where that is necessary to prevent an act from being absurd, to obviate repugnancy and inconsistency in the statute, complete the sense thereof, and give effect to the intention of the legislature manifested therein. This rule prevails where words have been omitted from a statute through clerical error, or by accident or inadvertence. The rule is especially applicable where such application is necessary to prevent the law from becoming a nullity.
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> "'Courts proceed with great caution in supplying alleged omissions in statutes. They will supply an omission only where such omission is palpable, and the omitted words are plainly indicated by the context or verifiable from other parts of the statute. Moreover, a court will not insert words in a statute which is so vague and uncertain as to have no definite meaning, or the meaning of which can be ascertained only by conjecture, or where the added words would render the statute inoperative.'
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> "73 Am. Jur. 2d Statutes § 203 (1974) (footnotes omitted). See State v. Calumet & Hecla Consol. Copper Co., 259 Ala. 225, 66 So. 2d 726 (1953)."

Pace v. Armstrong World Indus., Inc., 578 So. 2d 281, 284 (Ala. 1991).

As mentioned, the sentence in the Act providing for judicial review of the council's denial of a liquor-license application in this case is essentially similar to the sentence in § 28-1-7(c) providing for judicial review under the same circumstances, except that the Act removed the term "de novo" from the phrase "expedited de novo proceedings."

"'"[A] trial de novo means that the slate is wiped clean and a trial in the Circuit Court is had without any consideration being given to prior proceedings in another court."'" Mahoney v. Loma Alta Prop. Owners Ass'n, Inc., 84 So. 3d 907, 916 (Ala. Civ. App. 2011) (quoting Ex parte Dison, 469 So. 2d 662, 665 (Ala. 1984) (overruled on other grounds by Ex parte City of Dothan, 501 So. 2d 1136 (Ala. 1986)), quoting in turn Yarbrough v. City of Birmingham, 353 So. 2d 75, 78 (Ala. Crim. App. 1977)). This is the standard advocated by Hadi.

On the other hand, appeals from decisions of state agencies or other government entities are generally based entirely on the record created before those agencies or governmental entities, and judicial review of such a decision is deferential toward the decision of the agency.

> "'"Judicial review of an agency's administrative decision is limited to determining whether the decision is supported by substantial evidence, whether the agency's actions were reasonable, and whether its actions were within its statutory and constitutional powers .... Judicial review is also limited by the presumption of correctness which attaches to a decision by an administrative agency."

"'Alabama Medicaid Agency v. Peoples, 549 So. 2d 504, 506 (Ala. Civ. App. 1989). Also, the Alabama Administrative Procedure Act provides that,

> "'"[e]xcept where judicial review is by trial de novo, the agency order shall be taken as prima facie just and reasonable and the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, except where otherwise authorized by statute."

"'Ala. Code 1975, § 41-22-20(k). "Neither this court nor the trial court may substitute its judgment for that of the administrative agency." Alabama Renal Stone Inst., Inc. v. Alabama Statewide Health Coordinating Council, 628 So. 2d 821, 823 (Ala. Civ. App. 1993). "This holds true even in cases where the testimony is generalized, the evidence is meager, and reasonable minds might differ as to the correct result." Health Care Auth. of

> Huntsville v. State Health Planning Agency, 549 So. 2d 973, 975 (Ala. Civ. App. 1989).
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> "'Further, this court does not apply a presumption of correctness to a circuit court's judgment entered on review of an administrative agency's decision "because the circuit court is in no better position to review an agency's decision than this court." Alabama Bd. of Nursing v. Peterson, 976 So. 2d 1028, 1033 (Ala. Civ. App. 2007). ...'
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> "Alabama State Pers. Bd. v. Dueitt, 50 So. 3d 480, 482 (Ala. Civ. App. 2010)."

Alabama State Pers. Bd. v. Palmore, 273 So. 3d 816, 821-22 (Ala. Civ. App. 2018). The city argues that the applicable standard in this case also includes that deferential standard.

The Act presents a hybrid situation. It requires the circuit court to consider the testimony and matters presented to the council in the previous proceedings. Act No. 98-342, § 3. Thus, the circuit court is not beginning with a totally clean slate, as it would in a true de novo review. However, the Act also calls on the circuit court to consider "any new evidence presented in explanation or contradiction" to the evidence that had been presented to the council. Id.

At first blush, it appears difficult to reconcile allowing the circuit court to hear additional evidence that

was not presented to the council, which, under the ore tenus rule, generally calls for the court's findings of fact to be presumed to be correct, see Biggs v. City of Birmingham, 91 So. 3d 708, 711 (Ala. Civ. App. 2012), with requiring the circuit court to also apply the "usual presumption in favor of the findings by the city or administrative agency." City of Mobile v. Simpsiridis, 733 So. 2d 378, 382 (Ala. 1999). We must begin with the proposition that there was a reason that the legislature removed from the Act the term "de novo" as the method of judicial review. Pace, supra.

According to the Act, in conducting a judicial review of the denial a liquor license,

> "[t]he circuit court ... may set aside the denial of approval of a license only on the basis that the denial by the municipality was arbitrary and capricious in that there was no showing to the governing body of the municipality of any one of the following:
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> "(a) The creation of a nuisance.
>
> "(b) Circumstances clearly detrimental to adjacent residential neighborhoods or the public health, safety and welfare.
>
> "(c) Violations of applicable laws, ordinances or zoning regulations."

Act No. 98-342, § 2 (emphasis added).

Thus, the circuit court's review was conducted for the purpose of determining whether the council's decision to deny the liquor license was arbitrary and capricious and not whether the circuit court itself would grant or deny the license. As the Act states, the "new evidence" presented to the circuit court is intended to explain or contradict the testimony already presented to the council. Act No. 98-342, § 3. In other words, the new evidence is intended to assist the circuit court in determining whether the council's decision was arbitrary and capricious. See, e.g., In re Board of Dental Exam'rs v. King, 364 So. 2d 318 (Ala. 1978). A plain reading of the Act indicates that the "new evidence" is not meant to persuade the circuit court to grant a license. Accordingly, in determining whether the council's decision to deny the license was arbitrary and capricious, the "usual presumption in favor of the findings by the city" is applicable. Simpsiridis, 733 So. 2d at 382. Accordingly, the circuit court correctly found that the Act did not provide for de novo review and that there was a presumption of correctness in favor of the council's decision.

With that deferential standard of judicial review in mind, we turn to the merits of Hadi's appeal. Hadi asserts that the council's decision to deny its application for a liquor license was arbitrary and capricious.

In upholding the council's decision, the circuit court stated that it had considered the record of the hearing before the council and the ore tenus testimony presented at the hearing in the circuit court and found there had been a showing in the record that the license was denied because, it said, granting the license would have created a nuisance and/or circumstances clearly detrimental to the adjacent residential neighborhoods or the public's health, safety, and welfare. It then set forth the evidence supporting its conclusion, including much of the evidence this court previously outlined.

In support of its assertion that the council's decision was arbitrary and capricious, Hadi states that no witness said that Hadi would create a nuisance and that the council never offered that ground as a basis for its denial of Hadi's license. A showing of evidence to support only one of the grounds for denial of approval is necessary to uphold the

council's decision. Therefore, even if the council did not intend for the creation of a nuisance to be a basis for its denial, a showing that circumstances clearly detrimental to the neighborhood existed, as the circuit court also found, is sufficient to affirm the circuit court's judgment upholding the council's decision. Act No. 98-342, § 2.

Hadi argues that the evidence demonstrated that the store is surrounded by businesses, that "except for a few houses up a hill from Hadi, the closest residences are at least 700 feet away and separated from Hadi by two busy multi-lane roads," and that the entrance to the store cannot be seen from any of the residences. Therefore, it contends, the council could not demonstrate that granting Hadi a license to sell liquor would have been "clearly detrimental" to adjacent residential neighborhoods. The Act does not define "adjacent residential neighborhoods." If that phrase is read narrowly, i.e., that homes must abut the location of the store to which the license is to be granted, the council, which is familiar with the area where Hadi is located, could have believed that houses "up a hill from Hadi" were part of an "adjacent" residential neighborhood. If the phrase "adjacent residential

neighborhoods" is read more broadly to include an area where homes, schools, churches, parks, ball fields, and stores are in close proximity, then, based on the evidence presented, the council reasonably could have considered Hadi to be part of a residential neighborhood. Evidence indicated that a new liquor store did not conform to the revitalization plans for the area and that at least 200 residents in the area had signed a petition against granting Hadi a liquor license.

Moreover, Hadi's argument overlooks the second portion of the required showing, that is, that denial of Hadi's application would be arbitrary and capricious if there were no showing of circumstances clearly detrimental to adjacent residential neighborhoods "or the public health, safety and welfare." In other words, even if the area where the store is located is not in a residential area, the license still may be denied if approval would be clearly detrimental to the public's health, safety, and welfare.

Ample evidence was presented tending to show that Hadi is located in what the TPD considers a "high crime area" with a high incidence of alcohol-related crimes. Nathan Bonner, a representative of Stillman College, said that the college was

concerned about its students because of the proximity of Hadi to its campus, which were within walking distance of each other. A council member was concerned that allowing Hadi to sell liquor would be detrimental to the residents of an alcohol- and drug-rehabilitation facility one block from Hadi. As mentioned, schools, churches, parks, and play areas were also located near Hadi.

Other evidence, including various studies, was presented suggesting that the presence of liquor stores in urban areas, especially those stores targeting the African-American community, had an adverse effect on the community, including leading to an increase in violent and/or criminal acts. Evidence was presented to the council indicating that an area of Tuscaloosa that has not had a new liquor store open in 20 years has seen a drop in its crime rate, to the lowest in those 20 years. In Broughton v. Alabama Alcoholic Beverage Control Board, 348 So. 2d 1059 (Ala. Civ. App. 1977), this court held that the denial of a retail license to sell liquor for consumption off the premises was proper based on the proximity of those premises to a school and a church. Based on the record before us and the presumption of correctness that

the circuit court must apply to the council's decision, we conclude that the circuit court's determination that the city had made a sufficient showing of circumstances clearly detrimental to the neighborhood, which includes residences, and to the public's health, safety, and welfare is supported by the evidence.

Hadi also argues that a license cannot be denied based solely on speculation. This case does not involve a speculative basis for denial of the license. In King v. City of Birmingham, 885 So. 2d 802, 805 (Ala. Civ. App. 2004), whether to grant a liquor license to a new club was challenged on complaints that law-enforcement officials and residents had had with the conduct of patrons at the previous club in the same location. The previous club had been licensed as a "private club" with unlimited hours, catering to a "younger and presumably rowdier crowd." However, witnesses acknowledged that earlier establishments that sold alcohol from that location had not caused such problems. No evidence was presented to indicate that the new establishment would operate in a manner similar to the club that had caused issues with neighbors. This court held that the denial of a license on

the speculation that an establishment could be operated in violation of the law is arbitrary and capricious. Id. at 806. In this case, the council had before it grounds such as the level of crime and the nature of the neighborhood to support its decision for denying Hadi a license. The evidence does not support Hadi's contention that the denial of a liquor license in this case was based solely on speculation.

For the reasons set forth above, the judgment of the circuit court upholding the council's decision to deny a liquor license to Hadi is affirmed.

AFFIRMED.

Moore, Donaldson, Edwards, and Hanson, JJ., concur.