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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2019

2180615

City of Montgomery

v.

D&L Enterprises, Inc., d/b/a Larry's Trading

Appeal from Montgomery Circuit Court
(CV-18-901629)

THOMPSON, Presiding Judge.

The City of Montgomery ("the city") appeals from a judgment of the Montgomery Circuit Court ("the circuit court") reversing a decision by the Montgomery City Council ("the council") denying D&L Enterprises, Inc., doing business as

2180615

Larry's Trading ("Larry's"), a license to sell liquor for off-premises consumption. In reversing the council's denial of the license, the circuit court determined that the council's decision was arbitrary and capricious.

The record indicates the following. In the spring of 2017, Larry's applied for a Lounge Retail Liquor - Class II (Package) license for the purpose of operating a package store--i.e., a liquor store--at a location on Old Selma Road. That location is in Montgomery County ("the county") but is also within the city's police jurisdiction. Several city and county agencies responded to the application, including the city's planning-control department, which advised the council that a liquor store was permitted at the location for which Larry's was seeking the license. The county sheriff's department notified the city clerk's office that it had no concerns about the operation of the proposed package store, as long as there was no drinking on the premises. However, the sheriff's department subsequently revised its recommendation, stating that it had received complaints from citizens in the area about the operation of a package store at the proposed location and that if those citizens were opposed to the

2180615

operation of a package store, then so was the sheriff. The city police department opposed the granting of the license, but it gave no reasons for its opposition at that time.

On September 5, 2017, the council held a public hearing to consider Larry's application. At that time, the council tabled consideration of Larry's liquor-license application indefinitely. In July 2018, the council decided to take up the matter again, and it scheduled a public hearing for August 7, 2018. The record indicates that, before the public hearing, county commissioner Elton N. Dean, in whose district Larry's package store was to operate, did not oppose the issuance of the license, but he did not elaborate on his reasoning. A July 26, 2018, memorandum from a Montgomery police officer to the Montgomery police chief stated that the council president, Charles Jinright, opposed the approval of the application because "the community was opposed" to the liquor store. The memorandum indicated that the "Special Operations Division" of the police department "DOES have a concern about this application." However, no specific reason for the opposition was given. The memorandum also noted that there had been no fights, shootings, stabbings, or

2180615

disturbances at the location in the previous two years, although, it stated, the sheriff's department had responded to several thefts there. The police department also advised the council that Larry Green, the owner of Larry's, had no record of arrests or outstanding warrants.

On August 2, 2018, Sheriff Derrick Cunningham sent the council a letter stating that Larry's advertised that it sold fireworks, vehicles, and household retail items, among other items, and that it engaged in buying, selling, trading, and pawns. Sheriff Cunningham wrote: "It would appear that according to law, [Larry's is] ineligible for a liquor license due to the inventory being sold, which has been confirmed with the Alabama ABC Board." He also referred the council to a memorandum attached to the letter from a deputy who had canvassed the neighborhood within a 2,000-foot radius of where Larry's package store would operate to seek neighbors' opinions on whether the application should be granted. A number of neighbors opposed the application for many reasons. Among the reasons given were that a liquor store was "likely to bring trouble" to the neighborhood where children lived, that the liquor store would be near the entrance of a

2180615

residential neighborhood, and that there were already a sufficient number of establishments that sold beer and wine in the area and thus a liquor store was not needed at the Larry's location. One resident expressed a concern about an increase in traffic, and another was concerned about whether there would be sufficient parking. Several residents expressed opposition to alcohol in general. A representative of the Magnolia Woods group home for the mentally challenged, which lies within the area the deputy canvassed, objected to the approval of the application because of the proximity of the group home to the proposed location of Larry's package store.

The deputy's memorandum indicated that there were four churches in the area. The two closest were each 3/10 of a mile from the proposed location of Larry's package store; the farthest was 1.4 miles away. An elementary school is located two miles from the proposed location of Larry's package store.

The city health department had no issues with Larry's application, and the city finance department advised that Larry's owed no outstanding taxes.

2180615

Council minutes reflect that, at the August 7, 2018, public hearing, several residents spoke in opposition to the application. Green, the owner of Larry's, was not present at the public hearing, but his attorney spoke on his behalf. The attorney advised the council that the package store would be separate from the pawn shop that Larry's currently operates at the same location. The attorney also said that the pawn shop would not sell weapons.

The council voted on Larry's application at its August 21, 2018, meeting. At that meeting, one of the residents who had spoken against approval of the license presented the council with a petition signed by 117 homeowners in the area who were also opposed to approval of the license. Five members of the council voted to deny the application; three abstained from voting. No one voted in favor of the application.

2180615

Montgomery is a Class 3 municipality.¹ Thus, where, as here,

"'there is no statutory right of direct appeal from a local government's decision to deny an application for a liquor license, the only proper method of judicial review is by the common-law writ of certiorari'[]; but see §§ 28-1-6 and -7, Ala. Code 1975 (providing a statutory direct appeal from the denial or approval of a liquor license by certain municipalities)."

Montgomery City Council v. G & S Rest., 98 So. 3d 1, 1 (Ala. Civ. App. 2011) (quoting Phase II, LLC v. City of Huntsville, 952 So. 2d 1115, 1119 n.3 (Ala. 2006)). Accordingly, On September 5, 2018, Larry's filed a petition for a writ of certiorari in the circuit court challenging the council's denial of its application. The parties submitted briefs to the circuit court in support of their respective positions. It is unclear from the record whether a hearing was held. On April 11, 2019, the circuit court entered its judgment finding that the council's decision was arbitrary and capricious, and it set aside the denial of the license. In its judgment, the

¹"Class 3 municipalities are those having populations of 'not less than 100,000 and not more than 174,999 inhabitants' based on the 1970 federal decennial census. Opinion of the Justices No. 361, 693 So. 2d 21, 22 (Ala. 1997); Ala. Code 1975, § 11-40-12(a)." Phase II, LLC v. City of Huntsville, 952 So. 2d 1115, 1118 (Ala. 2006).

2180615

circuit court approved the license. The city timely appealed to this court.

On appeal, the city argues that the circuit court's determination that the council's decision was arbitrary and capricious is not supported by the record.

"A municipality has '"broad" discretion to approve or disapprove the issuance of liquor licenses with respect to locations within the municipality.' Phillips v. City of Citronelle, 961 So. 2d 827, 829 (Ala. Civ. App. 2007). However, a municipality's decision granting or denying a liquor license must be set aside on judicial review if the municipality acted arbitrarily or capriciously. Phase II[, LLC v. City of Huntsville], 952 So. 2d [1115] at 1119 [(Ala. 2006)]; Ex parte Trussville City Council, 795 So. 2d 725, 727 (Ala. 2001); and Phillips, 961 So. 2d at 829. As our supreme court explained in Phase II:

"'"In reviewing a municipal council's exercise of its legislative discretion to approve or disapprove the issuance of a restaurant liquor license, this Court must apply an 'arbitrary-and-capricious' standard." Ex parte Trussville City Council, 795 So. 2d 725, 727 (Ala. 2001).

"'"'A determination is not "arbitrary" or "unreasonable" where there is a reasonable justification for its decision or where its determination is founded upon adequate principles or fixed standards. State Department of Pensions and Security v. Whitney, 359 So. 2d 810 (Ala. Civ. App. 1978).

""If reasonable minds may well be divided as to the wisdom of [the decision maker's] actions, or there appears some reasonable basis for the classification made by the [decision maker], such action is conclusive and the court will not substitute its judgment for that of the [decision maker].""

"952 So. 2d at 1119 (quoting City of Huntsville v. Smartt, 409 So. 2d 1353, 1357-58 (Ala. 1982), quoting in turn Hughes v. Jefferson Cnty. Bd. of Educ., 370 So. 2d 1034, 1037 (Ala. Civ. App. 1979))."

Montgomery City Council v. G & S Rest., 98 So. 3d at 2-3. "To prove that a municipality's decision to approve or to disapprove a liquor license is arbitrary and capricious, the burden is on the claimant to show that there is no reasonable justification supporting the municipality's decision." Phase II, LLC v. City of Huntsville, 952 So. 2d at 1119.

In reaching its conclusion that the council's decision was arbitrary and capricious, the circuit court stated that the "record makes it clear that the only reason this license was not approved by the City is that a number of people who live in the area objected to a package store at that location." The circuit court also relied on an argument Larry's asserted, and which Larry's makes again in its brief

2180615

to this court, that the location where Larry's package store would operate was zoned "B-2" and that a package store is a permitted use in a B-2 zone.

In its appellate brief, Larry's argues that a liquor store is a business like any other, saying: "In reality, there is no difference between a package store and any other retail establishment." In support of its contention, Larry's quotes the following from Alabama Alcoholic Beverage Control Board v. City of Birmingham, 253 Ala. 402, 407-08, 44 So. 2d 593, 598 (1950):

"While we recognize that the operation of a liquor store is a governmental function, this is no reason why the Legislature cannot provide that a liquor store may be included within a zoning ordinance. A liquor store is a place where alcoholic beverages are placed on sale and sold to customers as in other stores and for this reason from the standpoint of zoning, could well be regarded as a business within the statute which authorizes a city to be divided into 'business, individual, and residential zones.'"

(Citation omitted; emphasis added.) We note that City of Birmingham involved the validity of a Birmingham zoning ordinance that our supreme court determined was an illegal attempt at "piecemeal or spot zoning." 253 Ala. at 407, 44

2180615

So. 2d at 597. It did not involve the approval or disapproval of a liquor license.

Merely because a liquor store is subject to zoning ordinances like any other business does not mean that a municipality must treat a liquor store like any other business in the context of licensing, however. Our supreme court has expressly rejected Larry's contention that there is no difference between a package store and any other business, writing:

"[I]t would be regarded as rather a naive conclusion should we declare that there is no material distinction between the strictly restaurant business and the retail beer business and between the sale of coffee, tea, milk and soft drinks as an incident to the sale of food and the sale of intoxicating beverages. We think it not fairly debatable that intoxicating liquors are in a class by themselves and not to be regarded as one of the ordinary commodities of food or other harmless products. Indeed, we have said as much. State ex rel. Wilkinson v. Murphy, 237 Ala. 332, 337(9), 186 So. 487, 121 A.L.R. 283 [(1939)]. That the carrying on of the business of selling beer and other intoxicants entails new problems and extra policing and creates new conditions vastly more undesirable in residential areas than the mere restaurant business seems to us to be quite clear."

Fulford v. Board of Zoning Adjustment of Dothan, 256 Ala. 336, 339, 54 So. 2d 580, 582 (1951) (emphasis added). See also Ex parte Alabama Alcoholic Beverage Control Bd., 819 So. 2d 50,

2180615

53 (Ala. 2001). Furthermore, "[n]otwithstanding the absence of restrictions in a statute or ordinance, licensing authorities have as a general rule been permitted to deny licenses where the proposed location is improper by reason of the location and its surroundings." Broughton v. Alabama Alcoholic Beverage Control Bd., 348 So. 2d 1059, 1060 (Ala. Civ. App. 1977).

The city relies on Montgomery City Council v. G&S Restaurant, supra, to support its contention that the council's decision to deny Larry's application was not arbitrary and capricious. In G&S, the circuit court overturned the council's denial of G&S's application for a liquor license for its restaurant. The record in G&S demonstrated that G&S had no history of tax or other legal problems. The owner had two 30-year-old convictions against her, and another criminal charge had been filed against her 20 years before. Four other liquor licenses existed in the vicinity, the closest being one block away from the restaurant. The nearest church and school were four blocks away, and neither objected to the approval of the license. The nearest residence was in the same block. As in this case,

2180615

the police had no record of fights, shootings, stabbings, or disturbances at the location of the restaurant. Unlike in this case, however, the police department indicated it had no concerns with approving the license. 98 So. 3d at 2.

The only objection to the approval of the license in G.S. came from then-council member Martha Roby. She stated that she had discussed the application with residents from the neighborhood where the restaurant was located. Roby also advised the council that "'the general consensus [in the discussion with the residents] was that it was not in the best interest of the safety and welfare of the neighborhood' to issue a liquor license for [G&S]." Id. at 3. Roby also said that a neighborhood association in the neighborhood had "voted 'overwhelmingly in opposition to this license.'" Id. Additionally, Roby pointed out that the restaurant was close to homes and near where children walked to an elementary school. Id. The circuit court determined that "'recitations of off-the-record discussions [were] inadequate'" under the circumstances to support the denial of G&S's application, and it reversed the council's decision. Id. at 2.

2180615

In reversing the circuit court's decision in G&S, this court concluded that Roby's statements regarding the location of G&S's restaurant in a residential area near an elementary school and the "strong opposition" from area residents had provided the council with "a reasonable justification to deny the liquor-license application" and that the council had not acted arbitrarily or capriciously. Id. at 3.

In G&S, this court cited Delta Oil, Inc. v. Potts, 479 So. 2d 1273 (Ala. Civ. App. 1985), in which this court had determined that the Alcoholic Beverage Control Board had not arbitrarily and capriciously denied an off-premises beer license based on the opposition of church, city, and school officials and area residents. The G&S court continued:

"Similarly, in Mims v. Russell Petroleum Corp., 473 So. 2d 507 (Ala. Civ. App. 1985), this court determined that the [Alcoholic Beverage Control Board (the 'ABC Board')] had not arbitrarily denied an off-premises beer license. In Mims, the proposed location of the applicant's store was very near schools, playgrounds, a church, a park, and a Girl Scout hut. 473 So. 2d at 508. Children frequently walked by the location of the store. Id. at 509. This court also noted community opposition to the beer-license application, a relevant factor in this case:

"Community standards, i.e., opposition to the location of retailers of intoxicants, also have a bearing on each

2180615

case. Cf. Broughton[v. Alabama Alcoholic Beverage Control Bd.], 348 So. 2d [1059] at 1060 [(Ala. Civ. App. 1977)]. There is evidence in the present case that the mayor, city council, school board, other community leaders, and citizens are strongly opposed to this particular location....'

"473 So. 2d at 509. See also Broughton, 348 So. 2d at 1061 ('We do not find any abuse of discretion by the ABC Board in denying this [off-premises beer] license because of the proximity of the school and church.');

and Potts v. Bennett, 487 So. 2d 919 (Ala. Civ. App. 1985) (concluding that the ABC Board had acted within its discretion in denying an off-premises beer license when an applicant's store was close to a school and churches, there was substantial opposition from local citizens, and there was some suggestion of a traffic hazard at the store)."

98 So. 3d at 4.

In this case, the record indicates that numerous residents in the neighborhood around Larry's location were strongly opposed to approval of its application for a liquor license. More than 100 area residents signed a petition against the liquor store, and a number of residents were present at the public hearing to oppose Larry's application. Several neighbors voiced their opposition at the public hearing. The residents' concerns involved an increase in traffic in the area, the trouble a liquor store was "likely"

2180615

to bring to the neighborhood, and a desire to protect their children from exposure to alcohol. A representative of a group home for the mentally challenged opposed the application because of the proximity of the group home to Larry's location. The city police chief and county sheriff both were opposed to the application. Council member Jinright also opposed the application. Although the nearest school was two miles away from the location of the proposed liquor store, two churches were within a half mile and two other churches were within a mile and a half of the location. A deacon from one of the churches was staunchly opposed to the approval of the application, and he represented to the council that a majority of the congregation of his church was also opposed.

Neither the circuit court nor this court is permitted to substitute its judgment for that of the council. Based on the record, the authorities cited, and the broad discretion afforded a municipality's decision to approve or disapprove an application for a liquor license, we conclude that the council had "reasonable justification" to deny Larry's application for a liquor license and that its decision was not arbitrary or capricious. Accordingly, we reverse the circuit court's

2180615

judgment. We remand the cause to the circuit court for the entry of a judgment affirming the council's decision denying the application.

REVERSED AND REMANDED.

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