NOT DESIGNATED FOR PUBLICATION

THE ORLEANS GRAPEVINE, INC.	*	**NO. 2002-CA-0280**
	*	**COURT OF APPEAL**
VERSUS	*	**FOURTH CIRCUIT**
CITY OF NEW ORLEANS, CITY OF NEW ORLEANS, DEPARTMENTS OF SAFETY AND PERMITS, AND FINANCE, BUREAU OF REVENUE; PAUL A. MAY; LESLIE T. ALLEY; ETTA MORRIS; VIEUX CARRE' COMMISSION; MARC COOPER; ET AL.	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2001-18450, DIVISION "H"
Honorable Michael G. Bagneris, Judge
* * * * * *

Chief Judge William H. Byrnes III
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(Court composed of Chief Judge William H. Byrnes III, Judge Charles R. Jones, Judge Patricia Rivet Murray)

JONES, J., DISSENTS

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<u>JUDGMENT VACATED; CASE REMANDED; ALTERNATIVE WRIT REINSTATED</u>

The defendant-appellant, the Vieux Carre Property Owners, Residents and Associates, Inc. (hereinafter referred to as "VCPORA") appeals a judgment granting the plaintiff a writ of mandamus directed to the City of New Orleans "acting through the Department of Safety and Permits and its Director, Paul May and its Zoning Administrator, Leslie, the Department of Finance and its Director Etta Morris and the Vieux Carre Commission and Its Director Marc Cooper, to issue all requisite approvals, permits and/or licenses authorizing The Orleans Grapevine, Inc. to commence operations and a standard restaurant serving beverage alcohol for on-premise consumption." The Orleans Grapevine, Inc., applied for a building permit (No. B 01001703) to "convert from first floor retail to standard restaurant as per plan – **no exterior work to be done,"** the premises located at 720 Orleans Avenue in New Orleans. On April 27, 2001, the permit was approved, including a Zoning Administration approval authorizing the conversion and specifically prohibiting exterior work.

On July 16, 2001, plaintiff through its project manager, Norman Allen

of Boot Construction, applied to the Vieux Carre Commission ("VCC") under a general work application to perform certain exterior and electrical work. On August 8, 2001, the plaintiff, through its architect, Peter Waring, withdrew the VCC application, an action characterized by VCPORA as inexcusable.

On August 10, 2001, plaintiff applied for an Occupational License, Sales Tax Registration Certificate and Class A-Restaurant Beer and Liquor Permits for its proposed business use of the property, i.e., a standard restaurant. On September 20, 2001, the plaintiff formally requested the City of New Orleans, Department of Safety & Permits to issue a Certificate of Occupancy.

On September 25, 2001, Leslie T. Alley, the Zoning Administrator for the Department of Safety and Permits, sent plaintiff a letter advising in pertinent part that:

> [P]ursuant to the proceedings in *French Quarter Citizens v. Orleans city Planning Commission, CDC No. 99-09615, writs denied,* your client must comply with the mandates of Article 8, section 8.1 of the CZO, prior to the issuance of a Certificate of Occupancy by this department.

On March 6, 2002, the plaintiff petitioned the trial court for the writ of mandamus directed to the City of New Orleans, Paul A. May, Director of the Department of Safety and Permits, Leslie T. Alley, Zoning Administrator of

the Department of Finance and Marc J. Cooper, Director of the Vieux Carre Commission, that is the subject of this appeal. The plaintiff's petition also asks for treble damages and attorney's fees from VCPORA, its officers, directors and members, and Patricia Meskill and Matilda Rowlan, for alleged violation of LSA-R.S. 51:121, et seq. On November 15, 2001, the trial court signed a judgment granting the plaintiff the writ of mandamus. The LSA-R.S. 51:121 issue was deferred. Therefore, the mandamus is the only matter to come before this court.

It should be noted that VCPORA is the only appellant. None of the parties to whom the writ of mandamus was directed have appealed, although the City of New Orleans filed a brief belatedly adopting by reference portions of the VCPORA brief. We find that VCPORA has a right to bring this appeal in spite of the fact that it was not named in the mandamus. LSA-C.C.P. art. 2086 states that:

> A person who could have intervened in the trial court may appeal, **whether or not any other appeal has been taken.** [Emphasis added.]

It stands to reason that if a third party may appeal under LSA-C.C.P. art. 2086, VCPORA which was already a party to the proceedings below should be able to appeal. Moreover, in *Vieux Carre Prop. Owners v. Decatur Hotel*, 99-0731 (La.App. 4 Cir. 11/09/99), 746 So.2d 806, 808-809,

this Court specifically held that VCPORA had standing on its own to bring a zoning matter to court. The wisdom of this Court's decision in *Decatur Hotel* is vindicated by the VCPORA's need to advocate these issues in the face of what appears to be a less than zealous pursuit of such zoning matters by the governing authority in this case and the *Decatur Hotel* case, the governing authority perhaps being faced with the unenviable task of allocating scarce resources in a poor city.

LSA - C.C.P. art. 3862 provides that "a writ of mandamus be issued in all cases where the law provides no relief by ordinary means or where the delay involved in obtaining ordinary relief may cause injustice." [Emphasis added.] Plaintiff in its petition asserts that no relief by ordinary means is available to it, but the appellant complains that the writ of mandamus was improvidently granted because the plaintiff did not first exhaust its right of appeal to the Board of Zoning Adjustments under Article 17, Section 17.2.6 or Article 14, Section 14.5.1 of the Comprehensive Zoning Ordinance. According to the VCPORA, had the plaintiff exhausted these administrative remedies without success, it then had the right under Article 14, Section 14.5.4 of the Comprehensive Zoning Ordinance to appeal to the district court. However, were the trial courts to find that "the delay involved in obtaining ordinary relief may cause injustice," then the writ of mandamus

would be proper regardless of the availability of relief by ordinary means.

Mandamus is tried by summary proceedings. LSA-C.C.P. art. 2592 (6). We infer that a lesser degree of formality may be permitted in summary proceedings, which, for example, may be tried in chambers. LSA-C.C.P. art. 2595. However, the rules governing ordinary proceedings are applicable to summary proceedings, except as otherwise provided by law. LSA-C.C.P. art. 2596. From this we infer that the rules of evidence employed in ordinary proceedings are not dispensed with and that the party requesting the issuance of the writ of mandamus has the burden of proof.

This is significant because the proceeding below was conducted with what could best be characterized as great informality. The only exhibit formally offered into evidence was a representation of the plaintiff's attorney's fees offered by its counsel in hopes that they might be recouped in subsequent proceedings. There was no sworn testimony. There are no affidavits or depositions in the record. The facts described above and below are only such as may be inferred by this court from pleadings and attachments that are uncontested.

The appellant filed a memorandum in opposition to the writ in the trial court asserting essentially a single basis for its opposition to the writ: Pursuant to Article 8, §8.1 of the Comprehensive Zoning Ordinance, "[t]he

change in the use of the existing building from retail use to restaurant use **along with a change in the signage, which constitutes a change to the exterior of the building**, requires a hearing before the" Vieux Carre Commission prior to the issuance of the permit. In other words, a change of use does not require a hearing unless there is a concomitant change to the exterior. However, a change of signage would constitute a change to the exterior requiring a hearing. Appellant contends that the existing "STEVE'S FRAMING SHOP" sign has been removed and that the plaintiff contemplates putting up a new sign advertising a new use without the required hearing.

At the hearing below, the plaintiff argued that "Steve" took his sign with him and that the plaintiff is not responsible for that. The appellant does not challenge that assertion on this appeal. The appellant instead contends that the plaintiff contemplates signage in the future which will constitute an exterior change and that a hearing should be held under Article 8, § 8.1 of the Comprehensive Zoning Ordinance in order to prevent, "Signs which are garish or otherwise out of keeping with the character of the Vieux Carre."

The plaintiff counters that it contemplates no exterior signage, only a sign placed on the inside of a window. Appellant does not contend that such a sign would constitute an exterior change. Instead, appellant, in effect,

contends that the plaintiff is engaged in a bait and switch tactic: That once the plaintiff has been allowed to open the restaurant the plaintiff will then come back and ask for an exterior sign which might then no longer be considered an exterior change concomitant with a change of usage, but merely a sign request in conjunction with what by that time will arguably be considered an existing usage. Marc Cooper, the director of the Vieux Carre Commission, although never sworn in as a witness, represented to the trial court that such sign requests made in conjunction with existing usages, are routinely granted by the Vieux Carre Commission staff without any legal requirement for a public hearing. The appellant contends that this Court should just assume that it is the plaintiff's intention to ask for an exterior sign once "existing usage" status has been achieved, in spite of plaintiff's protestations to the contrary. We cannot say that the trial court abused its discretion in failing to find an exterior change based on the speculation concerning plaintiff's intention to ask for an exterior sign in the future. Moreover, should the plaintiff choose to wait to make its signage request after existing usage has been established, this Court would consider that nothing more than clever timing rather than a violation of Article 8, § 8.1 of the Comprehensive Zoning Ordinance.

The appellants also argue that the plaintiff erected a fence in the rear

of the property, which constitutes an exterior change independent of the signage issue. In the trial court the attorney for the appellant argued that "the owners of the property are the owners of the Orleans Grapevine as well. . ." The attorney for the plaintiff countered that the fence was not on the premises leased by the restaurant entity. In the trial court the attorney for the VCPORA complained that the plaintiff did not offer any evidence of such a lease. On appeal the VCPORA repeats its contention made at the hearing in the trial court: "The owners of the entire property are the principals of the plaintiff. They are in fact one in the same." We note that the appellant offers no evidence showing that while the principles of the plaintiff are the owners of the entire property that the restaurant operation is not a separate legal entity owned by the same principals. We also note that the plaintiff styles itself as a corporation which would endow it with a legal existence separate from that of its stockholder-owners and separate from any other such freestanding legal entities owned by the same legal entities. Common ownership, therefore, does not have to mean a common legal identity. Appellant has raised no material challenge to the plaintiff's corporate existence.

The title to the property annexed as an exhibit to the appellant's brief describes two lots and municipal numbers 716-718-20-22 Orleans Street,

whereas the permits in dispute refer only to 720 Orleans which definitely allows for the possibility that the restaurant, which from the face of the petition is owned by a corporate entity with a legal existence separate from that of the individual owners shown in the title annexed to the appellant's brief, is on leased premises that do not encompass the property on which the fence was erected.

In the instant case we will assume for purposes of argument that The Orleans Grapevine, Inc. effectively discharged its initial burden of proof by showing that it had fulfilled all permitting requirements and had requested no exterior work. The burden then shifted to the appellant to show that exterior work was done. The appellant showed that a fence had been erected, which would ordinarily constitute exterior work. The burden then shifted back to The Orleans Grapevine, Inc. to show why it should have no legal responsibility for the fence. This it failed to do. Counsel for The Orleans Grapevine, Inc. argued that the fence was not on the premises that it leased. However, argument of counsel, no matter how artful, is not evidence. *Houston v. Chargois*, 98-1979 (La.App. 4 Cir. 2/24/99), 732 So.2d 71. The Orleans Grapevine, Inc. failed to offer a copy of the alleged lease or any other evidence from which it could be inferred that the fence does not constitute exterior work attributable to the restaurant premises.

Both the appellant and the appellee relied on argument of counsel in lieu of testimony in support of their positions below. This Court was able to piece together most of the case because most of the material facts are not contested. However, when The Orleans Grapevine, Inc. argued that the fence was not on its leased premises, the attorney for the appellant was quick to complain that the lease was not in evidence. In fact, there is no proof that there is a lease.

Because of the overall evidentiary inadequacy of the proceedings, this Court hereby vacates the judgment of the trial court and remands the matter in order to allow the parties to hold another hearing at which a proper record can be created, pending which the alternative writ provided by LSA-C.C.P. art. 3865 is reinstated.

JUDGMENT VACATED; CASE REMANDED; ALTERNATIVE WRIT REINSTATED