

**NOT DESIGNATED FOR PUBLICATION**

<b>SAVE AUDUBON PARK</b>	*	<b>NO. 2003-CA-1404</b>
<b>VERSUS</b>	*	<b>COURT OF APPEAL</b>
<b>BOARD OF ZONING ADJUSTMENTS, THE AUDUBON COMMISSION AND THE AUDUBON INSTITUTE</b>	* * * *	<b>FOURTH CIRCUIT  STATE OF LOUISIANA</b>

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APPEAL FROM  
CIVIL DISTRICT COURT, ORLEANS PARISH  
NO. 2002-15924, DIVISION "D"  
Honorable Lloyd J. Medley, Judge  
\*\*\*\*\*  
**Judge Dennis R. Bagneris, Sr.**  
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(Court composed of Judge Patricia Rivet Murray, Judge Dennis R. Bagneris Sr., Judge David S. Gorbaty)

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**AFFIRMED**

Appellant, Save Audubon Park, Inc. appeals a June 23, 2003

judgment, which denied its motion for summary judgment and granted appellees, Audubon Commission and the Audubon Nature Institute, Inc.'s (hereinafter "Audubon Nature Institute") motion for summary judgment.

For the following reasons, we affirm.

**FACTS**

On June 17, 2002, the Audubon Commission was issued a building permit by the Director of Safety and Permits, for the proposed construction of a one-story “Golf Clubhouse” to be erected at 6500 Magazine Street in the Audubon Park in New Orleans, Louisiana. On July 29, 2002, Save Audubon Park, Inc. (hereinafter “Save Audubon Park”) appealed the issuance of the building permit to the Board of Zoning Adjustments for the City of New Orleans. Following a hearing, the Board of Zoning Adjustments concluded that the issuance of the building permit was in accordance with the Comprehensive Zoning Ordinance of the City of New Orleans. Specifically, The Board of Zoning Adjustment’s disposition stated, in pertinent part:

Whereas the Board carefully considered the facts, the arguments for and against the application at the public hearing, and whereas no evidence was submitted to the Board that would have substantiated a claim that the restaurant contained in the proposed new construction of a one-story Golf Clubhouse at 6500 Magazine Street was other than incidental to the clubhouse nor was there any evidence submitted to the Board that the restaurant would be separate and distinct from the clubhouse; therefore, after considering the Comprehensive Zoning Ordinance, No. 4264 M.C.S., as amended, the Board is of the opinion that the decision of the Director of Safety & Permits to issue permit...to Audubon Zoo be UPHELD and the APPEAL DENIED as the plans and specs for new construction of a one-story golf clubhouse with accessory golf cart storage facility conform to the Comprehensive Zoning Ordinance 10.4.4(d).

On October 10, 2002, Save Audubon Park filed a Petition for Writ of

Certiorari and Judicial Review with the Civil District Court seeking a review of the decision of the Board of Zoning Adjustments. Pursuant to the provisions of La. R.S. 33:4727, the district court referred the matter to a referee. On April 10, 2003, following a hearing, the Referee signed a judgment, which ordered the following:

1. Save Audubon Park's Motion for Summary Judgment is DENIED;
2. Save Audubon Park's Motion for Leave to File Supplemental and Amending Petition is DENIED;
3. Save Audubon Park's Motion to Strike Affidavit of Patricia Fretwell is DENIED;
4. Save Audubon Park's Motion for Protective Order is MOOT;
5. Audubon Commission/Audubon Institute's Motion in Limine or Alternative Motion to Strike Previous Orders of the Court Concerning Evidence is DENIED;
6. Audubon Commission/Audubon Institute's Motion for Summary Judgment is GRANTED;
7. Audubon Commission/Audubon Institute's Motion to Compel is DENIED;
8. Audubon Commission/Audubon Institute's Declinatory Exceptions of Insufficiency of Service of Process, Dilatory Exception o[f] Prematurity, Unauthorized use of Summary Proceeding, Vagueness or Ambiguity, and Peremptory Exception of No Cause of Action and Motion to Strike, Directed to Supplemental and Amended Petition are MOOT;

9. Audubon Commission/Audubon Institute's Motion for Additional Security for Referee's Expenses is deferred for ruling by Judge Medley;
10. Audubon Commission/Audubon Institute's Motion to Strike Internet Exhibits Attached to Plaintiff's Motion for Summary Judgment is DENIED.

Thereafter, on June 23, 2003, the trial court granted appellees, Audubon Commission and Audubon Nature Institute's Motion for Entry of Judgment and signed a judgment, which adopted the findings of the Referee. Save Audubon Park now appeals this final judgment.

#### **STANDARD OF REVIEW**

Appellant, Save Audubon Park, asserts that appellees, Audubon Commission and Audubon Nature Institute, misstate the standard of review as being an "arbitrary or capricious" standard of review. Rather, Save Audubon Park argues that the issues presented in this appeal involve questions of law and that questions of law are reviewed under a *de novo* review. In support of its argument that the standard of review is *de novo*, Save Audubon Park cites *City of New Orleans v. JEB Properties, Inc.*, 609 So.2d 986 (La. App. 4 Cir. 11/24/92). In *City of New Orleans*, this court found that the issue before the trial court of whether a pavilion constituted an illegal expansion of a legal non-conforming use as defined by the Comprehensive Zoning Ordinance, was a question of law, not fact. *Id.* at

988. As such, the legal issue was whether the Board of Zoning Adjustment was correct in interpreting and applying the Comprehensive Zoning Ordinance. *Id.*

We agree with Save Audubon Park that this appeal involves a question of law, which requires a *de novo* review. The legal issue in this instant appeal is whether the Board of Zoning Adjustment was correct when it made the determination that the new construction of a one-story golf clubhouse, which provides food services, conforms to the Comprehensive Zoning Ordinance.

## **DISCUSSION**

Although Save Audubon Park alleges several assignments of error, the primary issue in this appeal is whether a golf clubhouse, which provides food services, constitutes a restaurant as defined by the Comprehensive Zoning Ordinance.

The Comprehensive Zoning Ordinance for the City of New Orleans, in Article 10, Section 10.4.4, provides:

The following accessory uses are authorized within the P  
Park and Recreation District:

\* \* \*

2. For public parks and recreational area in excess of fifty (50)  
acres:

\* \* \*

(d) Golf club houses when used in conjunction with golf  
courses, provided such facilities are located no closer than fifty

(50) feet from any residential zoning district, twenty (20) feet from any public street right-of-way, or twenty (20) feet from any other property line.

The Comprehensive Zoning Ordinance of the City of New Orleans, in Article 2, Section 2.2(153), defines a restaurant as:

An establishment where prepared foods, desserts or beverages are offered for sale for consumption on or off the premises and where the sales of such foods, desserts or beverages, exclusive of alcoholic beverages, **constitute fifty (50) percent or more of the revenue for said establishment** (exclusive of a snowball stand which does not provide permanent seating, sells only snowballs and contains a maximum floor area of 144 square feet, and is of a seasonal nature, operating during the period from April 1<sup>st</sup> through September 30<sup>th</sup>). Unless otherwise expressly permitted, live entertainment of any type shall be prohibited. Where live entertainment is permitted, live adult entertainment shall be prohibited....(Emphasis added)

We have thoroughly reviewed the record and find no legal error in the trial court's judgment, which granted appellees, Audubon Commission and Audubon Nature Institute's motion for summary judgment. Moreover, we find that the Referee's reasons for judgment are legally sound and logically articulated and we hereby incorporate them into this opinion and adopt them as our own:

### **REASONS FOR JUDGMENT**

In compliance with the preferential setting of an appeal from the Board of Zoning and Adjustments, pursuant to R.S. 33:4727(e)(5), the Civil District Court, Parish of Orleans, appointed and instructed the Referee to preside over this matter

in accordance with that statute.

The plaintiff, Save Audubon Park, Inc. (hereinafter “Save Audubon Park”), on October 10, 2002, filed a Petition for Writ of Certiorari and Judicial Review. Save Audubon Park opposed the decision of the Board of Zoning Adjustment of the City of New Orleans (hereinafter “BZA”) issued on September 13, 2002. BZA’s decision upheld the building of Permit Number B-02001965 issued by the Department of Safety and Permits to the Audubon Commission on June 17, 2002, for the construction of a golf clubhouse within the boundaries of Audubon Park. Save Audubon Park’s objection to the clubhouse was twofold: First, the golf clubhouse was not within the confines of the zoo; and secondly, restaurants are allowed in park districts only within the confines of the zoo.

While there are ancillary issues, the main issue in this summary judgment is as follows: Is the clubhouse a restaurant? The common sense view of the clubhouse is that it certainly contains a restaurant. However, the definition of a restaurant according to the applicable statutes and jurisprudence is not the same as is found in a dictionary.

The plaintiffs’ appeal states as follows:

Save Audubon Park is aggrieved by the granting of this permit because the proposed structure does not conform to the Comprehensive Zoning Ordinances (“CZO”) in that the plans include a large commercial kitchen and dining areas, which can only reasonably be used as a restaurant, and restaurants are not permitted in “P” park districts except within the boundaries of a zoo. *See* ZO § 10.4.4(2)(i)

CZO Art. 2, § 2, No. 153 provides the definition of a restaurant in pertinent part as follows:

An establishment where prepared foods, desserts or beverages are offered for sale for



consumption on or off the premises and where the sales of such foods, desserts or beverages, exclusive of alcoholic beverages, constitute fifty (50) percent or more of the revenue for said establishment...

Plaintiff, in its cross-summary judgment argues that:

The sale of food, des[s]erts or beverages, exclusive of alcoholic beverages, in the kitchen and dining areas of the clubhouse will not constitute fifty percent or more of the income of the kitchen and dining areas of the clubhouse, and that “this element is actually not necessary, because the ‘fifty percent rule’ is designed to distinguish between bars and restaurants, not between restaurants and clubhouses or restaurants and hotels. If the clubhouse restaurant were to begin selling more alcohol than food, it would become a bar and since neither restaurants nor bars are permitted for accessory uses in a park district, the fifty percent rule is really irrelevant to this inquiry. . . See Plaintiff’s Memorandum in Support of Motion for Summary Judgment, Alternatively, for Partial Summary Judgment at p.1-2.

The Referee is mindful of the excellent arguments put forth by the plaintiffs and finds much of it persuasive. Plaintiffs are correct that § 10.4.4(2)(i) specifically states that restaurants are not allowed in park districts except within the boundaries of the zoo.

Were it not for the definitional section of the CZO regarding the definition of a restaurant, Audubon Park may have prevailed on its summary judgment on the issue of whether the clubhouse contained a restaurant. As plaintiffs pointed out, the BZA made a finding of fact to the effect that:

The Board referred to the kitchen and dining facilities as “the restaurant,” and the restaurant contained in the proposed . . . clubhouse and not as “food service” or “concession stands.”

The BZA found that the clubhouse could not operate as a “full scale restaurant.” Again, a proper legal analysis requires a review of the CZO’s definition of the word “restaurant.”

In *Congregation of St. Patrick Catholic Church v. City of New Orleans*, 575 So.2d 415 (La. App. 4 Cir. 1991), the Court found as follows:

“Restaurants” is defined in City law, which coincides with State law. Section 5-48 of the City Code defines restaurant as “An establishment where food is prepared for consumption on the premises, which sale constitutes 50 percent or more of the revenues of said establishment.” The City, in Comprehensive Zoning Ordinance, Number 4264, M.C.S., defines a “standard restaurant” as an establishment “whose principal business is the sale of foods” to be consumed on the premises. State law has consistent definitions. La. R.S. 26:73(B); La. R.S. 26:272(B).

A fact finder in this case is mandated to find that the Comprehensive Zoning Ordinance due to the fifty percent plus definition prohibits the clubhouse from being defined as a restaurant. The Referee is mindful of the fact that this definition (fifty percent of its sales has to come from food) can lead to absurd results. For instance, under the law and this ruling, the clubhouse could literally allow a fast food restaurant to move into its facility, and as long as fifty percent of its total revenues did not come from the fast food restaurant, the clubhouse, could not and would not be classified as a “restaurant.” If a reviewing Court would find that the food-serving establishment within clubhouses should be defined differently, then the opposite result may be reached.

Given the facts and the law in this case, the Referee is faced with the inescapable conclusion that until the revenues from the food service of the clubhouse constitute fifty percent or more of the total revenues of the clubhouse, that clubhouse could never be defined as a restaurant. Accordingly, the plaintiff would not ever be able to prevail in this case. For those reasons and the reasons contained within this Reasons for Judgment, the Referee finds as a matter of law that the Motion for Summary Judgment filed by the defendants with the Cross-Motion for Summary Judgment filed by the parties disclosing the issue. Accordingly, the defendants, Board of Zoning Adjustment, The Audubon Commission and the Audubon Institute's Motion for Summary Judgment is GRANTED; and the plaintiff, Save Audubon Park's Motion for Summary Judgment is DENIED.

**AFFIRMED**