

**CHARLES GARBER,
EDWARD C. BONIN, RENE
FRANSEN, AND RODNEY
VILLARREAL**

VERSUS

**THE CITY OF NEW ORLEANS
THROUGH THE CITY
COUNCIL AND THE CITY
PLANNING COMMISSION**

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**NO. 2016-CA-1298

COURT OF APPEAL

FOURTH CIRCUIT

STATE OF LOUISIANA**

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2015-02849, DIVISION "I-14"
Honorable Piper D. Griffin, Judge

* * * * *

Judge Roland L. Belsome

* * * * *

(Court composed of Judge Roland L. Belsome, Judge Joy Cossich Lobrano, Judge Marion F. Edwards, Pro Tempore)

LOBRANO, J., CONCURS IN THE RESULT

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AFFIRMED
DECEMBER 13, 2017

This is a land use case. The owner of vacant commercial property in the French Quarter sought approval to remodel the structure and re-subdivide the lots in order to operate a Cuban restaurant: Café Habana. After the submission of several applications, the City of New Orleans, through both the Vieux Carré Commission (VCC) and the City Council, approved the owner's fourth application to remodel the property. The City of New Orleans, through the City Planning Commission (CPC), also approved the request for a re-subdivision. The Appellants, several neighbors and neighborhood preservation groups, brought suit for judicial review of the City's decisions. On appeal, the trial court found that there was nothing to suggest that the City acted unreasonably or inconsistent with its legal mandates; therefore, it denied relief to the Appellants. We agree and affirm.

FACTS AND PROCEDURAL HISTORY

The property owner, Esplanade Nola, LLC, owns two contiguous lots on the outskirts of the French Quarter, at the intersection of Esplanade Avenue and North Rampart Street. The lots house two separate buildings bearing the physical

addresses 1036-38 Esplanade Avenue and 1040 Esplanade Avenue.¹ The two respective properties, built in the early part of the 1900's, were previously used as a pharmacy and a gasoline service station before falling into disrepair.² Prior to filing the application at issue in this appeal, Esplanade Nola, or its affiliates, had filed three applications, the first in 2012, to develop the property into a standard restaurant. Those applications were either deferred or withdrawn.

On August 12, 2014, Esplanade Nola filed its fourth application for a “change of use” and renovation of its property. On August 26, 2014, after a hearing, including a staff presentation and opportunity for public comment, the Architectural Committee of the VCC elected to “**conceptually approve**” Esplanade Nola’s project proposal consistent with the staff recommendation. The staff recommended conceptual approval, provided that Esplanade Nola submitted design revisions to include plans for: elevation, capacity, table arrangements, signage, property line fencing, lighting, cooler condenser and kitchen exhaust placement, re-subdivision application documents and an updated survey. After the Architectural Committee granted conceptual approval, the application was forwarded to the VCC for conceptual review.³ At the VCC meeting on September 3, 2014, the staff made its presentation and the public was afforded an opportunity for comment. Ultimately, the VCC voted to approve the conceptual design consistent with the staff analysis and recommendation of the Architectural Committee.

¹ The record reflects that the 1040 Esplanade Avenue address is also identified as 1324 North Rampart Street.

² The property identified as 1036-38 Esplanade Avenue formerly operated as Villere’s Pharmacy. The property identified as 1040 Esplanade Avenue operated as the gasoline service station.

³ The minutes from the August 26, 2014, Architectural Committee meeting appear to reflect the incorrect date. However, the recording from the meeting confirms that the meeting occurred on August 26, not August 12, as reflected by the minutes.

On September 23, 2014, the Architectural Committee reviewed updated design plans in detail. The staff again recommended “**approval for the evolving design development,**” provided additional revisions were submitted. The designs were to include revisions to: signage, property line fencing, lighting, and cooler condenser and kitchen exhaust placement. In light of public comments, particularly noting capacity concerns, the Committee’s discussions focused on the use of two proposed courtyards. After an intensive discussion, the Architectural Committee voted to approve the project within the design development phase on the condition that the drawings were revised to clarify the use and occupancy of the courtyards. The application went back before the VCC on October 1, 2014. At the conclusion of the customary presentation, public comment session, and discussion, the VCC voted to defer action on the project until the Architectural Committee completed its review of the design development.

After deferral, the project went before the Architectural Committee two more times, on October 14 and December 9, 2014. On October 14, the Committee conceptually approved the project for the third time, requiring more revisions and a preliminary approval of the occupancy load from the State Fire Marshall.

Meanwhile, at the direction of the VCC, an application to re-subdivide the two lots into one single lot was filed on November 18, 2014, with the New Orleans City Planning Commission. On December 9, the Architectural Committee unanimously voted to approve the proposal and forwarded the project to the VCC for approval.

Finally, on January 7, 2015,⁴ after another meeting, the VCC voted to approve the project, provided that the use of umbrellas on the rooftop canopy

⁴ The minutes from the VCC meeting incorrectly reflect the date of the meeting as occurring on January 7, 2014.

would be strictly prohibited. Additionally, the VCC voted to forward a favorable recommendation to the CPC for approval of the re-subdivision. After two public hearings, the CPC approved the minor re-subdivision.

The decision of the VCC was appealed to the New Orleans City Council.⁵ On March 12, 2015, after a lengthy public hearing, wherein the executive director of the VCC provided a Property Summary report, the City Council voted to deny the relief sought in the appeal. On April 9, 2015, the City Council adopted written reasons for denying the appeal, citing to the VCC staff report in support.

The Appellants appealed the City Council and the CPC's administrative decisions to the trial court. On appeal, the trial court affirmed the City's decisions and denied the relief requested. This timely appeal followed.

STANDARD OF REVIEW

The general authority for local government to regulate land use is conferred by La. Const. Art. 6, § 17, which provides in part:

Subject to uniform procedures established by law, a local governmental subdivision may (1) adopt regulations for land use, zoning, and historic preservation, which authority is declared to be a public purpose; (2) create commissions and districts to implement those regulations; (3) review decisions of any such commission; and (4) adopt standards for use, construction, demolition, and modification of areas and structures.

Land use is subject to the police power of various governing bodies, and the courts will not interfere with the decisions of these bodies unless it is clear that their action is without any relation to the public health, safety, or general welfare. *See Palermo Land Co., Inc. v. Planning Com'n of Calcasieu Parish*, 561 So.2d 482, 491 (La. 1990); *Apasra Properties, LLC v. City of New Orleans*, 09-0709, p. 8 (La.

⁵ Appellants also attempted to appeal the City Planning Commission's ruling; however, the City Council notified them that only applicants were entitled to appeal rulings on minor re-subdivisions to the Council.

App. 4 Cir. 2/11/10), 31 So.3d 615, 621; and *K.G.T. Holdings, LLC v. Par. of Jefferson*, 14-872, p. 6 (La. App. 5 Cir. 3/25/15), 169 So.3d 628, 632, *writ denied*, 15-0810 (La. 6/19/15), 172 So.3d 652.

“In reviewing [land use] decisions of public bodies [the City of New Orleans through the City Council and the City Planning Commission in the instant case], courts will not interfere with the functions of these bodies in the exercise of the discretion vested in them unless such bodies abuse this power by acting capriciously or arbitrarily.” *Herman v. City of New Orleans*, 14-0891 (La. App. 4 Cir. 1/21/15), 158 So.3d 911, 915 (quoting *Lake Terrace Prop. Owners Ass'n v. City of New Orleans*, 567 So.2d 69, 74 (La. 1990)); *see also*, *Palermo*, 561 So.2d at 492; *Tucker v. City Council for City of New Orleans*, 343 So.2d 396, 399 (La. App. 4th Cir. 2/15/77), *writ denied sub nom.*, 345 So.2d 56 (La. 1977)(where this Court found that judicial review of action of a local governing body in reversing or modifying a decision of a historic district commission is limited to deciding whether the governing body of the subdivision acted reasonably), and La. R.S. 33:101.1⁶ (stating the same standard of review for a governing authority’s decision regarding a re-subdivision). “Generally, ‘capriciously’ has been defined as a conclusion of a commission when the conclusion is announced with no substantial evidence to support it, or a conclusion contrary to substantiated competent evidence.” *Herman*, 158 So.3d at 915-16. “The word ‘arbitrary’ implies a disregard of evidence or the proper weight thereof.” *Id.* at 916.

⁶ La R.S. 33:101.1 states, in pertinent part:

Except as otherwise provided in this Subpart, the act of approving or disapproving a subdivision plat is hereby declared a legislative function involving the exercise of legislative discretion by the planning commission, based upon data presented to it; provided that any subdivision ordinance enacted by the governing authority of a parish or municipality or the acts of the planning commission, or planning administrator shall be subject to judicial review on the grounds of abuse of discretion, unreasonable exercise of

A challenge to a land use decision in Louisiana is a *de novo* proceeding on the issue of whether the result of the legislation is arbitrary and capricious, and therefore a taking of property without due process of law.⁷ See *Mannino's P & M Texaco Serv. Ctr., Inc. v. City of New Orleans*, 15-0109, pp. 3-4 (La. App. 4 Cir. 8/19/15), 173 So.3d 1186, 1189 (citing *Palermo*, 561 So.2d at 492). Whether an ordinance bears the requisite relationship to the health, safety, and welfare of the public is a factual question which must be determined from the evidence in the record. *Id.* Legislative acts are presumed valid and the burden rests on the person challenging the act to establish by a preponderance of the evidence that the decision by the governmental body has no substantial relationship to public health, safety, morals, or general welfare of the municipality. *Id.* (citing *Palermo*, 561 So.2d at 493).

Appellants assert that the trial court applied the wrong standard of review when applying the arbitrary and capricious standard. Although they assert that there is a higher standard set forth in La. R.S. 25:746, there is nothing in the plain language of La. R.S. 25:746 that provides a standard of review different from the arbitrary and capricious standard enunciated in the well settled law and jurisprudence. Rather, the statute sets forth considerations to be made by the trial court to ensure that the governing body's decision comports with the essential duties and purpose of the commission, which is to preserve the character of the View Carré, as provided in the Louisiana Constitution.

police powers, an excessive use of the power herein granted, or denial of the right of due process.

⁷ When reviewing an administrative decision, the district court functions as an appellate court. Since no deference is owed by the appellate court to the district court's fact findings or legal conclusions, the appellate court need only review the findings and decision of the administrative agency. *Sylvester v. City of New Orleans Through Code Enft & Hearings Bureau*, 17-0283, 2017 WL 4534210, at *2 (La. App. 4 Cir. 10/11/17), *reh'g denied*, (10/20/2017).

LAW AND ANALYSIS

The Appellants seek review of two administrative decisions rendered by the City of New Orleans, through the City Council and the CPC. The Appellants raise numerous assignments of error, which involve three primary issues: 1) whether the City Council acted arbitrarily and capriciously in voting to approve Esplanade Nola's application for renovation and "change of use"; 2) whether the CPC acted arbitrarily and capriciously in approving the re-subdivision of Esplanade Nola's two lots; and 3) whether the trial court wrongfully excluded relevant evidence.

CITY COUNCIL DECISION

First, the Appellants challenge the VCC and the City Council's decision to approve Esplanade Nola's application for renovation and "change of use." Appellants raise two arguments regarding this approval: 1) the VCC's approval went beyond its authority, and 2) the VCC and the City Council violated its constitutional mandates to protect the Vieux Carré. Accordingly, they submit that the decision was arbitrary and capricious.

First, the Appellants argue that the VCC lacked authority to approve a change of use from vacant to restaurant, which is under the exclusive purview of the City Council. However, as urged by the City of New Orleans, the properties at issue were zoned Vieux Carré Commercial - 2 (VCC-2), which allows for more intensive commercial uses. As such, the properties at issue were already zoned and approved for use as a "standard restaurant," pursuant to the New Orleans Comprehensive Zoning Ordinance (CZO). Therefore, it was unnecessary for the City Council to approve a change of use.

Nevertheless, the record reflects that the VCC's "change of use" hearing was held in conjunction with the conditions set forth in Rule 8.1 of the CZO,⁸ which requires an applicant to obtain a special permit from the VCC to continue or change use, when a change in exterior appearance is also contemplated. Thus, we find that the VCC was within its authority to permit a change of use from vacant to restaurant as it pertains to the architectural safeguards and conditions set forth in Rule 8.1.

Next, the Appellants argue that both the VCC and the City Council violated its constitutional mandates. The Appellants contend that the VCC violated its constitutional duty to protect the quaint and distinctive character of the Vieux Carré by allowing a change of use and detrimental alterations to the property. The Appellants further contend that the City Council did not base its decision on any affirmative evidence; rather it adopted the VCC's staff report.

This Court, in *Apasra Prop., LLC*, recognized that the VCC has the constitutional authority and exercises state police power to regulate property within the Vieux Carré for the purpose of historic preservation. *Id.*, 09-0709, p. 8, 31 So.3d at 621. The original VCC was established by City ordinance in 1925 to preserve those Vieux Carré structures of special historic interest whose old, quaint,

⁸ It appears that the CZO was subsequently amended. As a result of the amendments, former Rule 8.1 is now Rule 2.10. At the time of the VCC and City Council hearings, Rule 8.1 stated, in pertinent part:

Where any change in exterior appearance is contemplated, the Vieux Carré Commission shall hold a hearing, and if it approves such change, it shall issue a special permit to continue the same use, or for any other use not otherwise prohibited in this district subject to the following conditions and safeguards:

1. The historic character of the Vieux Carré shall not be injuriously affected.
2. Signs which are garish or otherwise out of keeping with the character of the Vieux Carré shall not be permitted.
3. Building designs shall be in harmony with the traditional architectural character of the Vieux Carré.
4. The value of the Vieux Carré as a place of unique interest and character shall not be impaired.

and unusual architectural construction made them objects of special interest. However, initially, the VCC lacked any statutory authority to effectuate preservation of these structures. Recognizing this impediment and the historical and architectural importance of the Vieux Carré, 1921 La. Const. art. XIV, § 22(A) was amended, authorizing the New Orleans City Council to create the current VCC. *See City of New Orleans v. Bd. of Dir. of the Louisiana State Museum*, 98-1170, p. 2 (La. 3/2/99), 739 So.2d 748, 750.

La. Const. art. XIV, § 22(A), as amended, was divided into six sections entitled: creation and membership, purpose, definition of boundaries, tax exemption for certain buildings, acquisition of buildings, and duties of the commission. The amendment provided in pertinent part:

Section 22(A). Creation; membership. The Commission Council of the City of New Orleans is hereby authorized to create and organize a Commission to be known as the Vieux Carre Commission, to be appointed by the Mayor of said City with the advice and consent of the its Commission Council....

Purpose. The said Commission shall have for its purpose the preservation of such buildings in the Vieux Carre section of the City of New Orleans as, in the opinion of said Commission, shall be deemed to have architectural and historical value, and which buildings should be preserved for the benefit of the people of the City of New Orleans and the State of Louisiana, and to that end the Commission shall be given such powers and duties as the Commission Council of the City of New Orleans shall deem fit and necessary.

Vieux Carre Section defined. ...

Buildings; tax exemption; preservation. ...

Buildings; acquisition. ...

Duties of commission. Hereafter and for the public welfare and in order that the quaint and distinctive character of the Vieux Carre section of the City of New Orleans may not be injuriously affected, and in order that the value to the community of those buildings having architectural and historical worth may not be impaired, and in order that a reasonable degree of control may be exercised over the

architecture of private and semi-public buildings erected on or abutting the public streets of said Vieux Carre section, whenever any application is made for a permit for the erection of any new building or whenever any application is made for a permit for alterations or additions to any existing building, any portion of which is to front on any public street in the Vieux Carre section, **the plans therefor, so far as they relate to the appearance, color, texture of materials and architectural design of the exterior thereof shall be submitted, by the owner, to the Vieux Carre Commission and the said Commission shall report promptly to the Commission Council its recommendations**, including such changes, if any, as in its judgment are necessary, and the said Commission Council shall take such action as shall, in its judgment, effect reasonable compliance with such recommendations, or to prevent any violation thereof.

La. Const. art. XIV, § 22(A)(1921) (emphasis added). *See also City of New Orleans, supra* at pp. 2-3, 739 So.2d at 750-751. The Louisiana Constitution of 1974 retained the authority for the Vieux Carré Commission (VCC) in Art. VI, § 17. *Apasra Properties, LLC*, 09-0709, p. 8, 31 So.3d at 621. La. R.S. 25:746(B)(7) defines the “quaint and distinctive character of a historic preservation district” to include: “the historic or traditional ambiance of the district, the historic ‘tout ensemble’⁹ of the district, the old-fashioned or traditional neighborhood quality of the district, and the lighting and traditional architectural styles and details of the district.”

Appellants maintain that the VCC’s decision was detrimental to the “tout ensemble” of the French Quarter. However, the issue of whether the character or charm of a neighborhood has been harmed is purely subjective. *See Vieux Carre Prop. Owners, Residents & Assocs., Inc. v. Hotel Royal, L.L.C.*, 09-0641, p. 4 (La. App. 4 Cir. 2/3/10), 55 So.3d 1, 7, *on reh'g* (1/5/11), *writ denied*, 11-0258 (La. 4/29/11), 62 So.3d 112. And, neither the Appellants, nor this Court, are permitted

⁹ The tout ensemble describes the concept that preservation efforts must be directed not only at the antiquity of the buildings of the French and Spanish quarter, but also at the sum total effect of the Vieux Carré, buildings plus environment. *See City of New Orleans v. Pergament*, 198 La. 852, 5 So.2d 129 (1941).

to substitute their own judgment for that of the VCC. *See French Quarter Citizens For Preservation of Residential Quality, Inc. v. New Orleans City Planning Comm'n*, 99-2154, p. 3 (La. App. 4 Cir. 4/12/00), 763 So.2d 17, 18-19.

Contrary to Appellant's argument, the record reflects that the VCC's decision was thoroughly considered in contemplation of its purpose and reasonably related to the public health, safety or general welfare: to protect the character, environment, and history of the Vieux Carré. Aside from the three previous applications, the proposal set forth in Esplanade Nola's fourth application went before the Architectural Committee of the VCC four times and the VCC three times, before it received the final design approval of the VCC. During that time, the architectural design plans for capacity, signage, lighting, and fencing were extensively addressed, re-designed and re-submitted to conform with the design guidelines and mandates set forth by the VCC. At each meeting, the staff made a presentation and the public was given an opportunity to express its concerns.

The staff report and meeting minutes provide a detailed history concerning the design elements and various changes made to the design before its final approval. First, the plans reveal that the architectural changes associated with this project are relatively minor and do not change the historical character of the buildings. In addition, the properties were rated brown and yellow, meaning their contribution to the historical character of the neighborhood is low. Despite these facts, the VCC required numerous revisions to the lighting, fencing, signage etc. in order to preserve the original architecture of the buildings and protect the historic character and tout ensemble of the French Quarter.

The members of the public were primarily concerned with topics related to capacity and noise, particularly as it related to the use of two courtyards. Despite

acknowledging that the VCC does not address capacity issues, the Architectural Committee required the applicant to submit revised drawings clarifying the use of the courtyards and mandated preliminary approval of the occupancy load from the state Fire Marshall in response to public concern. The Architectural Committee then forwarded the application to the VCC. The staff report and meeting minutes from the VCC's final hearing reveal that the VCC thoroughly reviewed the application in light of its constitutional duties and Rule 8.1 of the CZO, ultimately approving the application. Specifically, banning umbrellas from the rooftop canopy demonstrates the VCC's particular attention to preserving the character and tout ensemble of the French Quarter.

Though the Appellants allege that the VCC did not comply with its own mandates and design guidelines, they fail to cite to any specific design element or alteration that violated the VCC mandates or guidelines. Interestingly, the only evidence offered in support of the Appellant's position concerned potential violations of the noise ordinance and occupancy concerns. Notwithstanding that such allegations are purely conjecture, the VCC, which is primarily tasked with architectural and historical preservation, does not provide oversight for violations of noise and occupancy laws. Therefore, such complaints should be made with the appropriate administrative agency, at the appropriate time.

Similarly, the Appellants argue that the City Council's decision was arbitrary and capricious, claiming the decision was made without evidence. This contention is unsupported by the record. Specifically, the record reflects that Appellants submitted a brief with exhibits and were afforded an opportunity to present public opposition at the Council hearing. The record also demonstrates that the VCC provided its staff report to the City Council, made a presentation, and

responded to questions in conjunction with the report at the Council meeting. The City Council relied on the staff recommendation and ultimately adopted the VCC staff report as its reasons for affirming the VCC's decision.

Not only is Esplanade Nola's final proposal to conduct minor renovations consistent with the design guidelines and functions of the VCC and Rule 8.1 of the CZO to preserve the quaint and distinctive character of the Vieux Carré; it serves to restore two abandoned and deteriorating structures that pose a safety threat and present an eyesore at the gateway of the French Quarter. Even when liberally construing the evidence in favor of preserving the quaint and distinctive character of the district, the decision to approve Esplanade Nola's application is supported by the record. Thus, we cannot say that the VCC acted arbitrarily or capriciously. Likewise, we cannot say that the City Council was arbitrary or capricious in voting to affirm the VCC's recommendation.

CITY PLANNING COMMISSION DECISION

Second, the Appellants assert that the CPC's decision to re-subdivide the two lots was arbitrary and capricious because it was inconsistent with the City's Master Plan. They further assert that the appeal rules for the Commission violated the State and Federal Constitutions.

As a preliminary matter, the Appellants maintain that proper public notice of the CPC hearing was not given. However, as the trial court pointed out, the record does not support this contention. Moreover, the Appellants were not prejudiced in any way as they appeared at the meeting and effectively expressed their opposition to the re-subdivision. To that end, Appellants also complain that their opportunity for public comment was limited, despite the fact that the CPC considered the re-subdivision at two separate meetings and allowed public participation in both

meetings. Not only was there an opportunity for comment at both meetings; members of the public were given an additional opportunity to submit written comments to the CPC.

Relative to consistency with the City's Master Plan, the Appellants argue that the re-subdivision is out of character and inconsistent with the tout ensemble of the surrounding historic residential neighborhood. They further argue that the CPC's decision was unsupported by the evidence.

In terms of future land use, the City's Master Plan allocates these two lots as "Mixed-Use Historic Core." The Master Plan sets the following parameters regarding these types of properties:

MIXED-USE HISTORIC CORE

Goal: Increase convenience and walkability for neighborhood residents and visitors within and along edges of historic core neighborhoods.

Range of Uses: A mixture of residential, neighborhood business, an visitor-oriented businesses. Uses may be combined horizontally or vertically, and some structures may require ground floor retail with residence or offices on upper floors. In some areas where current or former industrial use is verified, existing buildings may be appropriate for craft and value added industry.

Development Character: The density, height, and mass of new development will be consistent with the character and tout ensemble of the surrounding historic neighborhood. Appropriate transitions will be provided to surrounding residential areas.

The record reflects that the lot consolidation was proposed to address issues related to the building code and fire rating. The CPC staff report reveals that the CPC conducted a comprehensive comparison of lot sizes in the area. Contrary to Appellants' contention, the report noted that lot consolidation within the Vieux Carré was not out of the ordinary and occurred "with some regularity." It also provided a table of lot consolidations in the Vieux Carré from 2010- present, which reflected that seven out of eight were approved. Further, the CPC's research

revealed that there were approximately thirty lots in the VCC-2 district and around thirteen in the immediately surrounding residential districts that were larger than the lot proposed in this case.

Specifically in response to public comments, the CPC addressed concerns regarding the re-subdivided lots consistency with the Master Plan and concluded:

This proposal to consolidate the two lots into a single lot is consistent with this Mixed-Use Historic Core land use designation. As discussed in this report, the proposed lot's size and shape is consistent with the established lot pattern in the area. While the proposed use of the site by a restaurant is not the immediate subject of this report, the staff believes it is also consistent with the Mixed-Use Historic Core future land use designation. Restaurants, which would presumably serve a mix of neighborhood residents and visitors, are within the range of uses intended for the Mixed-Use Historic Core designation. The restaurant proposal also adheres to the Mixed-Use Historic Core designation's development character requirements, as the restaurant is to occupy two existing historic structures and the proposal has been approved by the Vieux Carré Commission.

The CPC considered all aspects of the mixed-use designation set forth in the City's Master Plan, which included both residential and commercial factors. Such considerations relate to the general welfare of the public and, thus, provided a rational basis for the CPC's decision to approve the re-subdivision. Accordingly, we do not find the CPC's decision on the re-subdivision to be arbitrary, capricious, or an abuse of discretion.

Turning to the issue on the CPC's appellate process, the Appellants claim that the CPC's regulation that permits only applicants to appeal minor subdivision decisions to the City Council violates the due process and equal protection provisions of the United States and Louisiana Constitutions. La. C.C.P. art. 1880 provides that if a municipal ordinance is alleged to be unconstitutional, "the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard." While the attorney general is not a necessary party that

must be joined in the suit, he must be served in actions seeking a declaration of unconstitutionality. *Vallo v. Gayle Oil Co., Inc.*, 94-1238, p. 6 (La. 11/30/94), 646 So.2d 859, 864; *see also Farmco, Inc. v. W. Baton Rouge Par. Governing Council*, 06-0073, 2006 WL 3109696, at *3 n. 7 (La. App. 1 Cir. 11/3/06), *writ denied*, 06-2841 (La. 2/2/07), 948 So.2d 1083.

In this case, the attorney general was not notified and served with a copy of the Appellants' petition. Since the Appellants did not comply with the correct procedure of notifying the attorney general of his challenge to the constitutionality of the regulation, we find that this issue is not properly before the Court on Appeal.

Nevertheless, the rule does not treat the Appellants' different from other similarly situated individuals, i.e. neighboring residents. Moreover, there is a rational basis for treating neighboring residents different from an aggrieved applicant, whose property rights are directly impacted. *See Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000); *see also Stotter v. Univ. of Tex. at San Antonio*, 508 F.3d 812, 824 (5th Cir. 2007) ("To establish such a ['class of one'] claim, the plaintiff must show that (1) he or she was treated differently from others similarly situated and (2) there was no rational basis for the disparate treatment.") (citation omitted). Further, La. R.S. 33:101.1 affords Appellants judicial review of the CPC's decision as demonstrated by this appeal.

EXCLUDED EVIDENCE

Finally, the Appellants assert that the trial court wrongfully excluded relevant evidence that was not contained in the appellate record. On appeal to the trial court, the Appellants attempted to illicit discovery and admit evidence of the prior applications filed by Esplanade Nola. Appellants argue that they were

entitled to a *de novo* trial pursuant La. R.S. 25:746. Specifically, they point to La. R.S. 25:746(D)(2),¹⁰ which, they allege, requires the trial court to take proof as in ordinary cases. We find nothing in the plain reading of that statute that provides for a new trial.¹¹ The trial court pleadings filed by Appellants confirm that Appellants were filing an appeal from two administrative decisions. Consistent with La. R.S. 25:746(D), the trial court took proof as it would in an ordinary appeal of a land use case involving an administrative decision. Therefore, the trial court was confined to the record before the agency. *Fritzner v. City of New Orleans*, 12-1617, p. 4 (La. App. 4 Cir. 5/22/13), 116 So.3d 945, 947 (in cases involving judicial review of an administrative agency's decision, the trial court is sitting as an appellate court and not exercising its original jurisdiction; therefore, the trial court's review is confined to the record before the agency).

Nevertheless, assuming *arguendo* that the trial court erred in excluding evidence relative to the prior applications, Appellants failed to proffer the evidence. When the trial judge rules evidence is inadmissible, a proffer (offer of proof) can be made. La. C.C.P. art. 1636. The purpose of mandating the trial court to allow the excluded evidence to be proffered is so that “the testimony (whatever its nature) is available for appellate review.” *Ohm Lounge, L.L.C. v. Royal St. Charles Hotel, L.L.C.*, 10-1303, p. 10 (La. App. 4 Cir. 9/21/11), 75 So.3d 471, 477 (citation omitted). It is incumbent upon the party who contends his evidence was improperly excluded to make a proffer, and if he fails to do so, he cannot contend such exclusion is error. *Id.*

¹⁰ La. R.S. 25:746(D)(2) states in pertinent part: “A suit filed under Paragraph (1) of this Subsection shall be tried as a summary proceeding. The court shall take proof as in ordinary cases.”

¹¹ Moreover, the legislative materials and discussions provided by the Appellants confirm that La. R.S. 25:746 was simply intended to provide a mechanism for an appeal since a new suit could always be filed.

In the instant case, Appellants sought to admit a “handful” of documents related to the prior applications. When the trial court refused, Appellants requested to proceed, asking to “proffer them if they ever come up.” The record is devoid of any such proffer from Appellants. Accordingly, they are precluded from raising this issue on appeal. *Ohm Lounge, L.L.C., supra.*

CONCLUSION

For the foregoing reasons, we do not find any error in the trial court’s finding that the City’s decisions, when approving Esplanade Nola’s requests for a re-subdivision and remodel, were not arbitrary or capricious. Accordingly, the trial court’s judgment denying the relief requested is affirmed.

AFFIRMED

Particularly, the amendments to the bill reflect that the proposed law initially provided for a *de novo* trial; however, that language was deleted from the final bill.