

**NEIGHBORS FIRST FOR
BYWATER, INC., JOHN
ANDREWS, GEORGIA
AINSWORTH, LANE LACOY,
BART THERIOT, JOE BROWN
AND KATHY BROWN**

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**NO. 2017-CA-0256

COURT OF APPEAL

FOURTH CIRCUIT

STATE OF LOUISIANA**

VERSUS

**THE CITY OF NEW
ORLEANS/THE NEW
ORLEANS CITY COUNCIL**

**APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2016-06148, DIVISION "B"
Honorable Regina H. Woods, Judge**

Judge Paula A. Brown

(Court composed of Judge Joy Cossich Lobrano, Judge Sandra Cabrina Jenkins,
Judge Paula A. Brown)

**LOBRANO, J., CONCURS IN THE RESULTS.
JENKINS, J., DISSENTS AND ASSIGNS REASONS.**

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AFFIRMED
12/13/2017

This matter arises out of Appellee’s, the City of New Orleans, through the New Orleans City Council (“the City Council”), decision to grant a Conditional Use Permit to Appellee, Pelican Royal, LLC (“Pelican Royal”). Appellants, Neighbors First for Bywater Inc., John Andrews, Georgia Ainsworth, Lane Lacey, Bart Theriot, Joe Brown, and Kathy Brown (collectively, “Appellants”), argue that the district court erred in denying its appeal of the City Council’s decision. For the reasons that follow, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On January 4, 2016, Pelican Royal submitted an application to the City Planning Commission (“the CPC”) for a Conditional Use Permit to build and operate a hotel/hostel (“the Project”) for property located in the historically designated Bywater District of New Orleans. Before the hearing, the CPC Staff reviewed the application and recommended its approval, subject to fourteen provisos to address community concerns.

On March 22, 2016, the CPC held a hearing, wherein parties were able to voice their opinion in support of or in opposition to the Project. David Woolworth—Pelican Royal’s acoustics and noise control consultant—told the CPC that he had been recently retained to conduct a noise analysis. He explained that it was the developer’s intention to minimize noise; however, he acknowledged that his report on the noise levels was incomplete. Other supporters of the Project said the Project would spur economic development, and bring amenities to the community—such as a coffee shop and a laundromat.

In contrast, the opponents to the Project argued that the Project was out of scale and did not fit the character of the neighborhood. Opponents raised concerns about the increased noise that would be generated by visitors to the Project and traffic congestion in the surrounding area. The opponents also questioned whether the Project would encourage community residents to convert their homes into short-term rentals.

After hearing public comments, the CPC voted to deny the application by a vote of seven to zero. The CPC provided the following “Reasons for Recommendation,” outlining their denial of the Project:

1. Despite the attempts from the applicant to address the concerns of neighbors, the development proposal is out of scale with the neighborhood.
2. The sound study done by the applicant’s consultant is not complete so the true noise impact cannot be accurately evaluated.
3. There were some concerns raised by the Commissioners that the hotel would contribute to the

trend of displacement of long-term residents in the area in favor of transient housing.

Shortly after the denial by the CPC, Pelican Royal applied to the City Council to have the decision of the CPC reversed.¹ The hearing was held on May 19, 2016.

Eight people spoke in favor of the Project, including Pelican Royal representatives. The representatives explained that the Project's scale had been modified to address concerns voiced by residents and the CPC in its recommendation for denial. They specifically referenced the reduction of the Project's size by several thousand square feet and the implementation of a noise abatement plan. Their acoustics consultant expert, Mr. Woolworth, provided an updated sound/noise level report that addressed methods to reduce noise levels. Supporters disputed that the Project would result in displacement of residents. They noted that the Project's proposed location was currently a vacant lot and stressed the Project's objective is to bring employment opportunities to the community and generate revenue. Neighborhood supporters also emphasized that the Project would attract more businesses, expand the tax base, and create jobs.

Four opponents spoke against the Project and underscored that the Project would negatively impact the community's quality of life. They reiterated concerns previously voiced at the CPC hearing, including excessive noise levels, the scale of the Project, parking availability, and traffic congestion. Residents expressed doubts that Pelican Royal could control noise or crowd levels. They also

¹ New Orleans, Louisiana - Code of Ordinances, Section 84-134(a) states in part: "[a]ny person aggrieved by any decision, act or proceeding of the commission shall have a right to apply in writing to the city council for reversal or modification thereof..."

complained that they had just recently received Pelican Royal's updated noise level report; consequently, they challenged the report's validity and requested more time to review its conclusions.

Each City Council member offered their respective views on the Project. Councilmember Ramsey—in whose district the proposed Project is located—stated that she and her staff had met with the developers and the residents on multiple occasions. Councilmember Ramsey noted that the Bywater District is historically a mixed use neighborhood with industrial and commercial uses. She explained that:

The lots at issue and the conditional use are zoned "HMC-2 commercial." The definition of "HMC" states that it is intended to permit more intense commercial uses especially on major traffic arteries. Some of the design and use-design goals and use of the land use plan of the Master Plan—are to have retail and other uses at neighborhood edges on under-utilized industrial commercial land, to establish gradual transitions between small scale and larger scale developments, to promote infield development on vacant lots in existing neighborhoods, to design mixed-use neighborhood centers on large sites, such as under-utilized or vacant retail or industrial parcels which integrate large mixed-use sites into the surrounding street grid. This project meets all of those goals in many ways. It's a former industrial site that has been vacant for years. It has a mix of uses: a restaurant, community space, laundromat, coffee and juice bar; it will employ at least 50 people and the applicant has worked very hard and has committed to work with training programs and to hire locally.

Councilmember Ramsey acknowledged some initial reservations about the Project, which caused her to ask Pelican Royal to submit more detailed plans. She also added provisos which were more restrictive than the fourteen recommended in the CPC Staff Report. She noted that Pelican Royal agreed to seventeen provisos suggested by the City Council, some of which included: a noise abatement plan approved by the Department of Safety and Permits; architectural design plan

approval by the Historic District Landmarks Commission (HDLC); a complete Stormwater Management Plan; revised landscaping plans; installation of short-term bicycle parking spaces; limitations on signage; a litter abatement plan approved by the Department of Sanitation; limitations on amplified noise in common areas; limitations on bar operating hours; and limitations on capacity in outdoor areas.

Councilmember Ramsey disputed that the Project included any outdoors mega-bar and commented that the Project also included more parking spaces than required. After careful study of the Project, the goals of the Master Plan, and the addition of her recommended provisos, Councilmember Ramsey concluded that the Project's proposed use fit into the Bywater District mixed-use neighborhood, and the goals of the Master Plan. She, then, moved to approve Pelican Royal's request for the Conditional Use Permit.

Councilmember Williams lauded Pelican Royal for its efforts to respond to community concerns. However, he said he was compelled to say "no" to the Project. He cited the Project's prime location and questioned whether its use, which catered to tourists, made sense for Bywater residents.

Councilmember Head noted the Project's proposed location was presently on vacant land. She determined the Project's intended use did not contradict the City's Master Plan and was allowed by law; accordingly, she stated that she would vote for the Project.

Councilmember Gray also supported the Project. He stressed that business people should be able to review the City of New Orleans' ("the City") regulations and have some predictability about the City's decision-making process. He also explained that the Project would create jobs and increase the City's tax revenue.

Councilmember Guidry, likewise, stated her support for the Project. She believed the developers were “straight shooters.” She concluded the Project would help the neighborhood, the provisos were thoughtful, and the overall proposal fit with the Master Plan.

Councilmember Cantrell acknowledged the community was divided over the Project. She favored the Project, after weighing the residential and commercial interests, considering the Master Plan, and acknowledging that the Bywater area was zoned for the use proposed by the Project.

Councilmember Brossett also expressed support for the Project. He highlighted the positive economic impact of the Project and that property on vacant lot would be returned to commerce.

At the end of their discussion—and after hearing from opponents and supporters of the Project—the City Council passed Motion Number M-16-206 (“the Ordinance”) to grant Pelican Royal a Conditional Use Permit, by a vote of six to one. Councilmember Jason Williams opposed the motion.

On June 17, 2016, Appellants filed a “Petition For Declaratory Judgment and Injunctive Relief And For Issuance Of Writ Of Review And/Or Certiorari” (the “Petition”) in the Civil District for the Parish of Orleans to review the City Council’s decision.² The Petition named the City, through its City Council, as a

² La. R.S. 25:746 provides in pertinent part:

D. (1) Any person aggrieved by an action or a decision of a governing body or authority affecting a district for the reason that an action or decision of the governing body or authority is inconsistent with the public trust placed in, or the essential duties and purpose of, the commission, or the governing body or authority, by the constitution for the preservation of essential assets of the district, may intervene in an action, or file suit within thirty days from the date of the action or decision in a district court in the parish in which the district is located to seek reversal or modification of the decision, injunctive relief, writ of mandamus, or any other relief provided by law or equity, in order to seek

defendant.³ In the Petition, Appellants asserted the City Council's decision-making process violated the City's Comprehensive Zoning Ordinance ("the CZO"), the City's Master Plan, and represented a clear abuse of discretion. Appellants' prayer for relief included the following: 1) a declaratory judgment finding the changes approved by the City Council null and void; 2) alternatively, reversal of the City Council's decision and a remand to the appropriate City agencies to review in accordance with appropriate procedures; 3) issuance of an injunction to suspend the passing of any ordinances regarding Pelican Royal's Conditional Use Permit; 4) rendition of a declaratory judgment finding that the City acted in violation of the Louisiana Constitution, the laws of the State of Louisiana and the City of New Orleans; and 5) issuance of a judgment declaring that the City and its administrative agencies exceeded their authority and acted arbitrarily and capriciously in granting the Conditional Use Permit. In response to Appellants' Petition, Pelican Royal filed a "Petition for Intervention" to protect its rights and enforce its interests.

The district court ordered the City, Pelican Royal, and the Appellants to provide briefs prior to the hearing. After submission of the briefs, the district court heard oral argument on October 14, 2016; and following the hearing, took the

compliance with the purpose and essential duties of the commission, or the governing body or authority.

See also New Orleans, Louisiana - Code of Ordinances, Sec. 84-134(b), which states:

Any person aggrieved by any decision of the city council affecting such district shall have the right to file a civil suit within 30 days from the date of decision in a court of competent jurisdiction under the rules of procedure governing same with the right to stay orders and injunctive relief provided the situation warrants it.

³The record shows the City filed an Exception of Improper Cumulation and Incorporated Memorandum on July 7, 2016, maintaining the Appellants had improperly cumulated claims

matter under advisement following the hearing. On November 22, 2016, the district court rendered its Judgment and Incorporated Reasons for Judgment, which denied Appellant’s appeal. The judgment and its incorporated reasons stated, in pertinent part:

For the reasons provided, and in accordance with the statutory and jurisprudential authorities, it is HEREBY ORDERED, ADJUDGED, AND DECREED that Petitioners’ appeal is DENIED.

This appeal of the district court’s judgment followed.

SUBJECT MATTER JURISDICTION

Before addressing the merits of this case, we must first address whether this case is properly before this Court. Appellate courts have the duty to determine, *sua sponte*, whether subject matter jurisdiction exists, even when the parties do not raise the issue. *Moon v. City of New Orleans*, 2015-1092, 2015-1093, p. 5 (La. App. 4 Cir. 3/16/16), 190 So.3d 422, 425. In determining whether the district court’s judgment conveyed appellate jurisdiction in the present matter, this Court examined La. C.C.P. art. 1918. That article provides that “[A] final judgment shall be identified by appropriate language.”

“When written reasons for judgment are assigned, they shall be set out in an opinion separate from the judgment.” La. C.C.P. art. 1918. Accordingly, a judgment—such as the present judgment—should not include reasons for judgment. However, this error does not necessarily nullify a judgment that is otherwise complete and valid except for the inclusion of reasons. *I.F. v. Administrators of Tulane Educational Fund*, 2013-0696, p. 6 (La. App. 4 Cir. 12/23/13), 131 So.3d 491, 496. In *Bd. Of Supervisors of Louisiana State Univ. v.*

which required different proceedings to obtain relief. The hearing on the exception was continued without date.

Mid City Holdings, L.L.C., this Court described a valid, final judgment as one that must be “precise, definite, and certain, and that “the result decreed must be spelled out in lucid, unmistakable language.” 2014-0506, p. 2 (La. App. 4 Cir. 10/15/14), 151 So.3d 908, 910 (citations omitted). However, in the interest of judicial economy, these principles are not always applied in the strictest possible manner. *See, e.g., Jones v. Stewart*, 2016-0329 (La. App. 4 Cir. 10/15/16), 203 So.3d 384, n.4 at 27 (finding the omission of certain decretal language in the final judgment was “insignificant” where the parties readily understood in whose favor relief was granted).

Here, the judgment unmistakably shows that the district court denied Appellants’ appeal. The judgment sufficiently indicates the relief afforded and the party against whom relief was denied. Therefore, we find the judgment contains definitive decretal language to confer appellate jurisdiction. *See* La. C.C. P. art. 1918; La. C.C.P. art. 2083.

ASSIGNMENTS OF ERROR

Appellants raise the following assignments of error: 1) the City Council’s adoption of the Ordinance granting the Conditional Use Permit violated applicable CZO procedures; 2) the adoption of the Ordinance violated the City of New Orleans’ Master Plan; 3) the adoption of the Ordinance violated the Louisiana and United States constitutions; and 4) the City Council abused its discretion when it arbitrarily and capriciously passed the Ordinance.

Appellants’ assignments of error fall within two categories. The first category—assignment of error number one—challenges the Ordinance’s validity based on the City Council’s alleged failure to comply with the CZO’s due process procedural mandates. The second category—assignments of error numbers two,

three, and four—intrinsically asserts that the Ordinance should be nullified because its adoption was arbitrary and capricious as it violated the Master Plan, the Louisiana and United States constitutions, and amounted to an abuse of discretion.

DISCUSSION

“A challenge to a zoning 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.” *Toups v. City of Shreveport*, 2010-1559, p. 4 (La. 3/15/11), 60 So.3d 1215, 1218. Special use permits are entitled to the same standard of review as other zoning enactments. *Morton v. Jefferson Parish Council*, 419 So.2d 431 (La. 1982). “[J]udicial review of zoning decisions acts merely as a check on this legislative power granted to parish officials to ensure that there is no abuse of power. Courts will not and cannot substitute their judgment for that of the legislative authority.” *Palermo Land Co., Inc. v. Planning Com’n of Calcasieu Parish*, 561 So.2d 482, 492 (1990).

“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. If it appears appropriate and well founded concerns for the public could have been the motivation for the zoning ordinance, it will be upheld.” *Palermo*, 561 So.2d at 492.

Well-established Louisiana jurisprudence attaches the presumption of validity to zoning ordinances. *Id.* at 491. Accordingly, courts uphold the ordinance’s validity whenever the propriety of a zoning decision is debatable. *Id.* at 493. Appellate review of a district court judgment regarding its consideration of a zoning board decision “does not consider whether the district court manifestly erred in its findings, but whether the zoning board acted arbitrarily, capriciously or

with any calculated or prejudicial lack of discretion.” *King v. Caddo Parish Commission*, 1997-1873, pp. 14-15 (La. 10/20/98), 719 So.2d 410, 418. “Capriciously” has been defined as a conclusion reached with no substantial evidence to support it or a conclusion contrary to substantial competent evidence; whereas, the term “arbitrary” infers a disregard or failure to give proper weight to the evidence. *Rubenstein v. City of New Orleans*, 2007-1211, p. 3 (La. App. 4 Cir. 4/30/08), 982 So.2d 964, 966 (citing *Lake Terrace Property Owners Association of New Orleans*, 567 So.2d 69, 74-75 (La. 1990)). As further espoused in *Lake Terrace Property Owners Association*, “[i]n reviewing the decisions of public bodies, (the city council in the instant case), the 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.” *Id.* at 74.

When determining the reasonableness of a city council decision, appellate courts must review the opinions and concerns raised at the public hearing and any testimony presented at trial. *Prest v. Parish of Caddo*, 41,039, p. 5 (La. App. 2d Cir. 6/2/06), 930 So.2d 1207, 1211. “Expressions of opinion made by citizens to a legislative body serve as a manner by which the legislative body learns the will of the people and determines what may benefit the public good.” *Id.*

CZO PROCEDURES

Appellants argue that Pelican Royal and the City Council failed to comply with mandatory CZO procedural requirements. In general, CZO procedures require conditional use permit applicants to complete a Project Neighborhood Participation Program (Project NPP), which describes the proposal; submit a copy of the Project NPP to registered neighborhood groups; list the concerns of any participants; provide timely notice of any hearing date to interested parties; and

requires applicants to receive a recommendation from the CPC before any action is taken by the City Council.⁴

⁴ 4.2.B INITIATION

Zoning text and map amendments are initiated as follows:

1. The City Council may initiate a zoning text or map amendment by adoption of a motion.
2. A property owner in the city or a person expressly authorized in writing by an owner may file an application for a text amendment.
3. A property owner in the city or a person expressly authorized in writing by the owner may file an application for a zoning map amendment for the area of land for which the map amendment is requested. The application shall bear the signature and acknowledgment of the owner(s) or authorized agents of not less than fifty percent (50%) of the area of land for which the zoning amendment is requested. Where property is jointly owned, all co-owners of the property or their authorized agents shall sign the application for the property to be included in the fifty percent (50%) area requirements.

4.2.C AUTHORITY

The City Council shall take formal action on requests for zoning text or map amendments after receiving a recommendation from the City Planning Commission, in accordance with Sections 5-406 of the City Charter.

.....

4.2.D.2 PRE-APPLICATION MEETING AND PROJECT NEIGHBORHOOD PARTICIPATION PROGRAM

.....

- a. Applicants shall first meet with the staff of the City Planning Commission to become familiar with the procedure and approval standards for zoning amendments and to obtain guidance on the requirements of the Project NPP.
- b. The Project NPP shall include the following information:
 - i. A brief description of the proposal. Map amendment applications shall include the type of land use request, the name of the zoning district, and the article of the Comprehensive Zoning Ordinance.
 - ii. An outlined area map and a contact list for notifying the individuals and entities identified in Section 3.3.
 - iii. A general description of how parties on the contact list will receive information on the project, including a statement as to which public notification techniques will be used for the project.
 - iv. A general description of how parties on the contact list will be informed of any changes or amendments to the proposed project after the applicant's initial contact.
 - v. A statement as to how those impacted by the proposal will be provided an opportunity to discuss the request if issues or questions should continue or suddenly arise.
- c. The applicant shall provide the typed Project NPP and notice, including email notification to applicable registered neighborhood associations, of an opportunity for

Here, Appellants do not contest that the application denied by the CPC complied with CZO guidelines. Instead, Appellants allege the City Council's approved application did not meet CZO guidelines because it was a separate and distinct application from the one considered and denied by the CPC. Appellants argue that Pelican Royal retained a new architectural firm that submitted different design and use plans that the CPC had not reviewed. They assert that the rooftop bar, restaurant, coffee shop, laundromat, and patios, were additions not included in

interested parties to attend a meeting to discuss the proposed application not less than fourteen (14) nor more than thirty (30) days after the date on which the applicant provides notification to the parties on the contact list. In addition, the applicant shall notify the City Planning Commission of the meeting date, time, and location not less than fourteen (14) days prior to the meeting. The applicant shall hold the meeting at the noticed time. The applicant shall distribute informational handouts to meeting attendees. The handouts shall include information about the requested zoning district, registering with City notification system(s), accessing application documents and NPP meeting summary reports. For the purposes of this section, meetings may be held in a physical location that is in accordance with the City Planning Commission's Administrative Rules, Policies and Procedures. The notice provided in accordance with this section shall include a brief description of the request and shall indicate the existing zoning classification of the subject property and the zoning classification the applicant intends to request and the citation of the zoning district name and article.

d. The applicant shall submit a Project NPP report with the application. The report shall provide the following information:

- i. The names of the individuals and entities that were notified and the total number of number of people that participated in the process.
- ii. A list of the concerns, issues, and problems expressed by the participants.
- iii. A statement as to how each concern, issue, and problem is addressed and how the applicant intends to continue to address them. If the concern, issue, or problem is not being addressed, the applicant shall state the reasons.
- iv. Copies of letters, affidavits, meeting invitations, newsletters, publications, and petitions received in support of or in opposition to the proposed project, and any other materials pertaining to the notification process.
- v. The date, time, and location of all meetings held with interested parties or a statement indicating the reasons if no meeting was held. No information pertaining to any meeting held more than one hundred eighty (180) days prior to the submittal of the application shall be accepted as part of the Project NPP report, except where subsequent meetings with interested parties have occurred within the one hundred eighty (180) days preceding the submittal of the Project NPP report.
- vi. A completed sign-in sheet that includes the names, addresses, and contact information for meeting attendees.

the application denied by the CPC and constitute additional uses of the proposed Project, not just changes in design. Appellants argue that the City Council exceeded its authority in granting the Conditional Use Permit because the CPC had not reviewed or issued a recommendation on the “new” application. Appellants rely, in part, on CZO 3.2.B4, which provides that “[a]new determination of completeness is required if the applicant materially changes the application from prior submittal.”

Appellants contend that Louisiana courts require strict compliance with statutory procedures regulating the enactment of zoning laws, citing *State ex rel. Holcombe v. City of Lake Charles*, 175 La. 803, 144 So. 502 (1932). In *Holcombe*, the Court found a zoning ordinance void because the hearing was published for less than the statutorily required thirty days. Appellants also reference *Breaux v. Town of Oberlin*, 247 So.2d 195 (La. App. 3 Cir. 1971), where the Court nullified a zoning ordinance because the city council held the hearing fourteen days after the notice was published, instead of the required fifteen days.

We find that the facts of the present case are distinguishable from *Holcombe* and *Breaux*. In the case *sub judice*, the question of Pelican Royal’s and the City Council’s CZO procedural compliance pivots on whether the City Council approved a second permit application that had not undergone CPC review. To resolve that question, we must consider whether the application approved by the City Council had additional uses which materially changed the application from the one considered by the CPC.

In opposition, the City Council and Pelican Royal counter that although the design of the Project changed, its use remained the same as that put forth before the CPC—namely, “to open a hotel/hostel in excess of 10,000 square feet.”

Our scrutiny of the record shows that on February 17, 2016, Pelican Royal submitted the following request to the CPC for a Conditional Use Permit:

ZONING DOCKET 017/16 - Request by MAZANT, LLC AND JOHN J. CUMMINGS, III ***FOR A CONDITIONAL Use to permit a hotel/hostel over 10,000 square feet in floor area in an HMC-2 Historic Marigny/Treme/Bywater Commercial District***, on Square 132, Lots S or S2, 21 or 21A, R1 or R, S, T, 6 or Pt. 4, 7 and 8, in the Third Municipal District, bounded by Mazant, Chartres, Bartholomew and Royal Streets. The municipal addresses are 600-626 MAZANT STREET, 4024-4030 ROYAL STREET and 4010 CHARTRES STREET. (PD 7) (SL). (Emphasis added).

The record also reveals that the City Council approved the following motion for a Conditional Use Permit:

BE IT MOVED BY THE CITY COUNCIL OF NEW ORLEANS, [t]hat the unfavorable recommendation of the City Planning Commission on ZONING DOCKET NO. 17/16 - MAZANT, LLC AND JOHH J. CUMMINGS - ***Requesting a Conditional Use to permit a “hotel/hostel over 10,000 square feet in floor area in an HMC-2 Historic Marigny/Treme/Bywater Commercial District*** on Square 132, Lots S or S2, 21 or 21A, R1 or R, S, and T, 6 or Pt. 4, 7 and 8, in the Third Municipal District, bounded by Mazant, Chartres, Bartholomew and Royal Streets (Municipal Addresses: 600-626 Mazant, 4024-4030 Royal and 4019 Chartres Street), be, and the same is hereby overruled and the request is granted subject to seventeen (17) provisos. (Emphasis added).

Clearly, the permit application denied by the CPC and the application approved by the City Council requested the same conditional use—a permit for a “hotel/hostel over 10,000 square feet in floor area in an HMC-2 Historic Marigny/Treme/Bywater Commercial District.” Thus, Appellants’ claim that the

changes in design reflect a new application that requires a separate CPC review and recommendation is unpersuasive.

We note at the outset that the “new uses” complained of by Appellants, specifically, the alleged additions of a café/coffee shop, juice bar, outdoor/indoor bar, and laundromat, were previously addressed and considered by the CPC Staff report. At the March 22, 2016 meeting of the CPC, the CPC Preliminary Staff Report described Pelican Royal’s Project as follows:

Zoning Docket 017/16 is a request for a conditional use to permit a hotel/hostel over 10,000 square feet in an HMC-2 Historic Marigny/Treme/Bywater Commercial District. **The applicant proposes to build a 48,021 square feet hotel/hostel, with 16 hotel single-occupancy rooms, 28 hostel multi-occupancy rooms, a parking lot, a 4,000 square feet restaurant, a 1,151 square feet coffee shop and a 1,151 square feet laundromat** on the first floor. The proposed hotel/hostel would also include a **720 feet bar** connected to the hotel lobby. Hotels under 10,000 square feet are permitted uses in the HMC-2 Historic Marigny/Treme/Bywater Commercial District. Above 10,000 feet, they are a conditional use. The petitioned site is located in a small commercial district, in close proximity to residential areas, and consequently is susceptible to create certain nuisances that could affect the surrounding residential properties. The use is compliant with the Master Plan and the general purpose and intent of the applicable zoning district regulations, therefore the staff supports the application in concept. (Emphasis added).

Moreover, by definition, a hostel’s use includes sharing of a bathroom, lounge, and kitchen facilities and a hotel’s ancillary uses include restaurants, bars, and recreational facilities. *See* CZO 26.6. Appellants concede that a restaurant and bar are permissible uses for a hotel/hostel. As such, when we consider that the application reviewed by the CPC also contained use requests for restaurants, coffee shops, bars, laundromats, and parking, we find the “additions” complained of by the Appellants do not equate to new uses.

It is undisputed that there are differences in the application denied by the CPC and the one approved by the City Council. However, nothing within the CZO prohibits the City Council or developers from revising proposals, hiring a new architect, or adding provisos—such as what occurred in the present matter—to address issues initially raised by the CPC in its original review of the permit application. Indeed, the CZO allows for revisions in the conditional use to reflect changes recommended by the CPC or the City Council “deemed necessary for the protection of the public health, safety, and welfare.” CZO 4.3.E.1. Many of the changes discussed herein, such as a re-figuration of the Project’s size and implementation of a noise abatement plan, align with concerns raised by the Appellants and the CPC and reflect conditions imposed by the City Council for the general public welfare.

Based upon our *de novo* review, the City Council’s approval of the Conditional Use Permit met the CZO’s procedural requirements—the City Council issued its recommendation on the same permit application that had previously been considered by the CPC; public hearings were offered with proper notice; and the City Council gave the requisite weight to the opinions offered by residents and neighborhood associations. This Court finds no material changes between the uses requested in the CPC application and the City Council application which would require the application’s resubmission to the CPC for review. Accordingly, this assignment of error lacks merit. We now consider whether the City Council’s approval of the Conditional Use Permit was arbitrary and capricious.

ARBITRARY AND CAPRICIOUS

Master Plan

Appellants assert the City Council’s grant of the Conditional Use Permit was arbitrary and capricious because the decision was inconsistent with the City’s Master Plan. Appellants emphasize that the Master Plan for the City of New Orleans is created and prepared by the CPC and requires that “[a]ll land use action must be consistent with the goals, policies and strategies in the elements (section) of the Master Plan called the ‘Land Use Plan.’” See Home Rule Charter of the City of New Orleans, Section 5-404. They also represent that under the Home Rule Charter, Section 5-406(1), all ordinances and amendments inconsistent with the Master Plan shall be null and void. They contend that, in this instance, the City Council’s approval of the Conditional Use Permit violates the Master Plan because the Project does not fit the neighborhood, residents opposed the Project, and the CPC initially denied the permit application.

Determining whether a zoning ordinance bears the requisite relationship to the health, safety and welfare of the public is a fact question which is resolved based on the evidence in the record. *Toups v. City of Shreveport*, 2010-1559, p. 4 (La. 3/15/11), 60 So.3d 1215, 1218. The evidence in the present matter documents that the majority of the City Council found the Project was consistent with the Master Plan. Councilmember Ramsey’s review of the Project, with the added provisos, concluded the Project fit into the neighborhood and met the goals of the Master Plan. Councilmember Ramsey specifically noted that Pelican Royal’s design changes—such as the Project’s smaller scale—incorporated CPC’s concerns and fit within recommendations of the Master Plan. Similarly, Councilmembers Head, Guidry, and Cantrell agreed that the Project’s design was

consistent with the City’s Master Plan and favored the provisos recommended by Councilmember Ramsey. Councilmembers Gray and Brossett noted the potential positive economic of the Project.⁵ The CPC’s Preliminary Staff Report also found the Project “compliant” with the Master Plan.

The evidentiary record contradicts Appellants’ claim that the approval of the Conditional Use Permit is inconsistent with the City’s Master Plan. Hence, this assignment of error is without merit.

Improper Taking

Appellants next suggest that the approval of the Conditional Use Permit amounts to a “taking” in violation of the Louisiana and United States constitutions. A regulatory taking results when the regulation destroys a major portion of the property value. *State, Dept. of Social Services v. City of New Orleans*, 1995-1757, p. 7 (La. App. 4 Cir. 5/29/96), 676 So.2d 149, 154. A zoning action which effectively deprives an owner of his property’s value without compensation is unconstitutional. *Id.* Here, Appellants contend that the Ordinance’s passage “could” result in a diminution of the value of neighboring properties. However, the record is devoid of any evidence to support that contention. Our jurisprudence is well-settled that appellate review is limited to the evidence in the record. *See Miccol Enterprises, Inc. v. City of New Orleans*, 2012-0864, pp. 6-7 (La. App. 4 Cir. 12/19/12), 106 So.3d 746, 750-51 (noting that “[a] court of appeal is a court of record, which must limit its review to evidence in the record before it”). Therefore, the lack of an evidentiary record lends no credence to this assignment of

⁵ As previously referenced herein, Councilmember Williams—the lone dissenting voter—expressed concerns that the Project primarily benefitted tourism and non-residents; however, he did not state the Project’s use conflicted with the Master Plan.

error. However, even if this Court were to consider the substance of this alleged error, we find it lacks merit.

As established in *Toups*, 2010-1559, p. 4, 60 So.3d at 1215, the issue as to whether or not a zoning decision amounts to an unlawful taking without due process of law centers on whether the decision was arbitrary or capricious. The action of a governmental body is arbitrary and capricious if it bears no relation to the health, safety, or general welfare of the public. *Palermo*, 561 So.2d at 491. Appellate courts shall not invalidate a zoning action unless “there was no room for a reasonable difference of opinion” and “there was no substantial evidence upon which the legislative action could have been justified.” *Four States Realty Co., v. City of Baton Rouge*, 309 So.2d 659, 666 (La. 1975).

Here, the City Council conducted the statutorily required hearing. Councilmembers also reviewed correspondence from citizens, met with neighborhood residents and the developers, and placed provisos on the Project that addressed neighborhood and CPC concerns. They debated the Ordinance. Before the actual vote, the majority faction of the council provided reasons in support of its decision to vote in favor of the Ordinance and the dissenting councilmember provided reasons for his opposition.

Upon review, the record contains substantial evidence to justify the City Council’s zoning action; and thus, the decision cannot be invalidated by this Court. Therefore, as the City Council’s action was not arbitrary and capricious, the approval of the Conditional Use Permit did not amount to an unlawful taking in violation of the Louisiana and United States constitutions.

Abuse of Discretion

For similar reasons, we also find no merit in Appellants' claim that the City Council abused its discretion approving the Conditional Use Permit. Zoning is a legislative function, the authority for which flows from the police power of governmental bodies. *King v. Caddo Parish Commission*, 719 So.2d 410 at 418. "Courts will not interfere with this legislative prerogative unless the zoning decision is "palpably erroneous and without any substantial relation to the public health, safety or general welfare." *Prest*, 41,039, p. 3, 930 So.2d at 1210.

The record here establishes that the Ordinance to grant the Conditional Use Permit was approved after public hearings, input from neighborhood associations and residents—some of whom expressed approval for the Project—and changes in the Project consistent with the CPC and City Council recommendations. "[I]t is not within the province of the appellate court to second guess a zoning decision that appears to have been based on appropriate and well-founded concerns for the public." *Toups*, 2010-1559 at pp. 5-6, 60 So.3d at 1218 (quoting *TSC, Inc. v. Bossier Parish Police Jury*, 38,717 (La. App. 2 Cir. 7/14/04), 878 So.2d 880). Although Appellants clearly disagree with the City Council's decision, our judicial review does not entail questioning the wisdom or good policy of municipal ordinances. *Palermo*, 561 So.2d at 491. Given that the City Council's actions were not arbitrary and capricious, its passage of the Ordinance granting the Conditional Use Permit did not constitute an abuse of its discretion.

CONCLUSION

Appellants have the heavy burden of proving the City Council's decision to grant the Conditional Use Permit was arbitrary and capricious. *See Jenniskens v. Parish of Jefferson*, 2006-252, p. 3 (La. App. 5 Cir. 10/17/06), 940 So.2d 209, 212. When we review the record in its entirety, it contains sufficient evidence to support that the City Council's decision was reasonably related to the public's general safety and welfare; the decision was not arbitrary and capricious. Appellants failed to meet their burden of proof. Accordingly, the district court did not err in denying Appellants' appeal.

Wherefore, based on the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED