

**VIEUX CARRE COMMISSION
FOUNDATION**

*

NO. 2017-CA-0527

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VERSUS

COURT OF APPEAL

*

**THE CITY OF NEW
ORLEANS, ET AL**

*

FOURTH CIRCUIT

STATE OF LOUISIANA

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2017-03823, DIVISION "L-6"
HONORABLE PAULETTE R. IRONS, JUDGE

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**JAMES F. MCKAY III
CHIEF JUDGE**

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(Court composed of Chief Judge James F. McKay III, Judge Edwin A. Lombard,
Judge Roland L. Belsome)

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REVERSED AND RENDERED

JANUARY 31, 2018

The defendants, the New Orleans City Council and Cajun 411, LLC, seek review of the trial court's granting of a preliminary injunction sought by the plaintiff, Vieux Carré Commission Foundation. For the reasons that follow, we reverse the trial court's judgment and dissolve the preliminary injunction.

FACTS AND PROCEDURAL HISTORY

The facts giving rise to this case revolve around a piece of property located at 411 Bourbon Street in New Orleans's Vieux Carré or French Quarter, and owned by Cajun 411, LLC. The property formerly housed a strip club and a novelty shop that sold "adult merchandise." Cajun 411 desires to open a "family style" restaurant at this location and wants to add a third floor rooftop with seating to the building. The City of New Orleans's Comprehensive Zoning Ordinances allow construction up to fifty feet in the French Quarter but the Vieux Carré Commission (VCC) Guidelines advise that rooftop additions on buildings that are less than three full stories in height are not recommended. Such renovations and/or additions to buildings in the French Quarter, require the review of the VCC and the approval of the City Council.

In January of 2016, Cajun 411 applied for a building permit to add a partial second-floor addition (part of the building was already two-stories tall) to its building. In September of 2016, the VCC recommended approval of that permit following several revisions and a process that included meetings between Cajun

411's architect and the VCC, its staff and its architectural sub-committee.

Thereafter, Cajun 411 realized that additional seating and storage would be necessary for its venture's success. Therefore, Cajun 411 applied in October of 2016 for a second permit to build a third-floor addition, smaller than the full footprint of the original building and providing space for a small rooftop deck.

After again beginning the VCC approval process, Cajun 411 believed that it would again be a lengthy period before approval was given for the second building permit. Therefore, Cajun 411 requested a meeting between its owner, its architect, the VCC staff, and District "C" Councilmember Nadine Ramsey. Following that meeting, the VCC's staff, on February 14, 2017, recommended, with changes to certain details, conceptual approval of the application to the VCC's architectural sub-committee. The architectural sub-committee, however, refused to recommend Cajun 411's application to the full VCC, and "deferred" the application back to the staff. Cajun 411 appealed this decision to the full VCC which, at its March 8, 2017 meeting, voted to "defer" the application back to the architectural sub-committee.

Cajun 411 appealed the VCC's decision to "defer" its application to the New Orleans City Council. At the Council's meeting of March 23, 2017, it heard Cajun 411's appeal of the VCC's failure to act on Cajun 411's application. Following debate and public comment, by a vote of 6-to-1, the Council granted Cajun 411's appeal, overruled the decision of the VCC deferring the application, and made allowances for final details to be approved by the VCC's staff.

On April 21, 2017, the Vieux Carré Commission Foundation (VCCF)¹ filed this action seeking injunctive relief pursuant to La. R.S. 25:746(D). On May 3, 2017, a TRO was issued by the district court enjoining Cajun 411, the City, and the City Council from taking any further action regarding a permit for construction of the third floor addition until it ruled upon the VCCF's request for preliminary injunction. On May 24, 2017, the district court found the VCCF showed the immediate irreparable injury, loss, damage or impairment to an essential asset of the Vieux Carré would result if the preliminary injunction was not issued. Accordingly, the district court issued a preliminary injunction enjoining the City and the Council "from taking any further action relating to the current application filed on behalf of Cajun." It is from this judgment that Cajun 411, the City and the City Council now appeal.

DISCUSSION

On appeal, the City Council raises the following assignments of error: 1) the trial court erred in granting the Foundation's request for a preliminary injunction and enjoining both the City of New Orleans and the New Orleans City Council from "taking any further action" regarding the defendant Cajun 411's pending application before the Vieux Carré Commission for a building permit when: a) the

¹ According to the appellee's brief, the Vieux Carré Commission Foundation is a 501(C)(3) corporation that is operated to do all things necessary to 1) support the efforts of the VCC to protect the quaint and distinctive character of the Vieux Carré and to protect the value to the community of those buildings having architectural and historical worth; and 2) support the efforts of the VCC to preserve and protect not only the antiquity of the buildings of the French and Spanish Quarter, but also its "*tout ensemble*." "The *tout ensemble* describes the concept that the preservation efforts [of the VCC, Council, and City] must be directed not only at the antiquity of the buildings of the French and Spanish Quarter, but at the sum total effect of the Vieux Carré, buildings plus environment." City of New Orleans v. Louisiana State Museum, 98-1170 p. 14, fn. 15 (La. 3/2/99), 739 So.2d 748, 579.

Foundation failed to present any proof that an “essential asset” of the Commission would suffer irreparable injury, loss or damage if the injunction was not issued; and b) the Foundation failed to make a prima facie showing that it would prevail on the merits of the case; 2) because the trial court made no finding that the Council acted arbitrarily or capriciously in approving Cajun’s appeal from the Commission’s failure to act on Cajun’s Application, it was legal error for the trial court to enjoin the City and the City Council from taking further action relating to Cajun’s application; and 3) the Foundation cannot meet the test of Louisiana jurisprudence for having a real and actual interest in the cause it asserts and therefore has no right of action. This Court should take notice of that and dismiss the lawsuit.

Cajun 411 raises the following assignments of error: 1) the trial court clearly erred in enjoining the City and the City Council from taking any further action relating to the current application filed on behalf of Cajun with the VCC to construct the proposed third floor addition to the building owned by Cajun and located at 411 Bourbon Street. The trial court’s order is overly broad and vague as it has no temporal limitations whatsoever; it precludes Cajun from exercising its legal rights of appeal related to property that it owns within the Vieux Carré, and it undermines the legal authority vested in the City Council related to the review of the VCC’s “recommendations;” 2) the trial court clearly erred in finding that the City Council does not have the legal authority as the “governing body” over the VCC to vacate or overrule a “recommendation” or “failure to act” by the VCC.

Any arguments that the City Council “usurped the authority” of the VCC are legally baseless; 3) the trial court clearly erred in finding that the Foundation satisfied its strict burden on its motion for preliminary injunction of proving that “immediate and irreparable injury, damage or impairment” would result to an “essential asset” of the Vieux Carré if the extraordinary remedy of a preliminary injunction was not granted; 4) the trial court clearly erred in basing its ruling granting a preliminary injunction upon the “public trust” placed in the VCC, although there was absolutely no evidence in the record to show that the “public trust” in the VCC would be irreparably harmed, particularly in light of the fact that there was nothing in the record to address the “public trust” placed in the City Council as the “governing body” over the VCC; and 5) the trial court clearly erred in issuing an injunction against the City and the City Council absent any finding that the City Council’s decision to overturn the Foundation’s deferral was arbitrary and capricious. The trial court further erred by substituting its judgment for that of the authorized governing body – the City Council.

However, there are basically only two issues before this Court: 1) whether the City Council had the authority to grant the appeal of the VCC’s deferral; and 2) whether the trial court properly granted the VCCF’s request for a preliminary injunction.

The City Council acted within the scope of its constitutional and statutory powers when it heard and ruled on Cajun 411’s appeal from the VCC’s deferral of its application back to the architectural subcommittee. The Louisiana Constitution

of 1974 establishes the powers of the City of New Orleans, and the City's Home Rule Charter sets out the powers of the City Council. Acting pursuant to these powers and authorities, the Council enacted Ordinance No. 166-31(a) establishing the Vieux Carré Commission and Ordinance No. 166-1 setting forth the purpose of the Commission: the preservation of such buildings as, in the opinion of the Commission, have architectural and historical value and which should be preserved for the benefit of the people of the City and the State. The Council further enacted ordinances to set forth the workings of the Commission, including No. 166-36 requiring that the Commission "report promptly its recommendations" to the director of Safety & Permits. The Council also reserved to itself the right to hear and decide appeals from the Commission: "If the applicant for a permit shall refuse to accede to reasonable changes or decisions by the [Commission], according to its guidelines, the applicant may then appeal such decision or recommendation to the council." Ordinance No. 166-37 (in pertinent part). These ordinances are in keeping with the powers delegated to the Council by the Louisiana Constitution and the City's Home Rule Charter.

Additionally, in 2001, the Louisiana legislature, in La. R.S. 25:746, expressly empowered the council to hear appeals from the Commission. That statute permits an applicant such as Cajun 411 to "apply in writing to the [Council] for a reversal or modification of the decision, recommendation, act or proceeding [of the Commission], or for an order to take action or a specific action...." *See* La. R.S.25:746 (C)(1). When Cajun 411 so applied to the Council, the Council acted

within the scope of its Constitutional and statutory power in hearing and acting on that application.

The VCCF contends that the VCC's deferral or failure to act on Cajun 411's application was not appealable to the City Council because it was not a final decision or recommendation. However, this contention is incorrect. La. R.S. 25:746(C)(1) provides:

Any person aggrieved by a decision, recommendation, act, **failure to act**, or proceeding of a commission or an agency of the governing body or authority which has permitting, regulatory, or enforcement authority within a district, which decision, recommendation, act, **failure to act**, or proceeding is inconsistent with the public trust placed in, or the essential duties or purpose of, the commission, or the governing body or authority, by the constitution for the preservation of essential assets of the district, may apply in writing to the governing body or authority for a reversal or modification of the decision, recommendation, act, or proceeding, or for an order to take action or a specific action, in order to comply with the purpose and essential duties of the commission or the governing body or authority. Such person may also have a stay or stop order issued while the application is pending. (*emphasis added, ours*).

The clear wording of the statute provides that a concerned party may appeal the failure to act of a commission or an agency to governing body or authority which established it. Therefore, Cajun 411 was within its rights when it appealed the tabling of its application by the VCC to the City Council. It is also evident that the City Council had the authority to act because the VCC's authority emanates from that body.

In general, “[t]he standard of review for a preliminary injunction is whether the trial court abused its discretion in ruling.” Rand v. City of New Orleans, 2012-0348 (La.App. 4 Cir. 12/13/12), 125 So.3d 476, 479. However, this broad abuse of discretion standard only applies when the trial court “committed no error of law

and was not manifestly erroneous or clearly wrong in making a factual finding that was necessary to the proper exercise of its discretion. Id., *citing Yokum v. Pat O'Brien's Bar, Inc.*, 2012-0217, p. 7 (La.App. 4 Cir. 8/15/12), 99 So.3d 74, 80.

“where errors of law are involved, the appropriate standard of review is *de novo*.” Hyman v. Puckett, 2015-0930 (La.App. 4 Cir. 5/4/16), 193 So.3d 1184, 1188.

Based on our findings above, it is clear that the trial court's ruling was based on an error of law and therefore a *de novo* review is warranted.

Injunctive relief is a “harsh, drastic remedy” and should only issue when a petitioner is threatened with irreparable harm and has no adequate remedy at law. Faubourg Marigny Imp. Ass'n., Inc. v. City of New Orleans, 2015-1308, pp. 12-13 (La.App. 4 Cir. 5/25/16), 195 So.3d 606, 615, *quoting Napco, Inc. v. City of New Orleans*, 2006-0603, p. 6 (La.App. 4 Cir. 3/7/07), 955 So.2d 155, 160.

In the instant case, the trial court's reason for granting the injunction was that in its opinion the “public trust” in the VCC would suffer irreparable harm if Cajun 411 was allowed to appeal the VCC's failure to act to the City Council. Yet nowhere during the hearing does the trial court address the underlying question of what is the public trust. There is also no evidence in the record as to what the trial court based its ruling that this “public trust” will suffer “immediate and irreparable injury, loss, damage or impairment” unless the City and the Council are enjoined from working out the final details with Cajun 411 for its proposed improvements and issuing a building permit for the same. There is only speculation by the trial court of possible future consequences and argument by plaintiff's counsel.

Accordingly, the foundation failed to make a *prima facie* case that the VCC would suffer “irreparable harm” by the Council's exercise of its constitutional and statutory power to hear and decide an appeal from the VCC and issue a building

permit. As such, the trial court committed legal error by enjoining the City Council from the exercise of its constitutional and statutory powers in the absence of any finding that the Council acted arbitrarily and capriciously.

Therefore, it is incumbent upon this Court to review the entire record in its entirety to determine if there is any good reason for the preliminary injunction to have been entered. After a thorough review of the record we can find no reason that a preliminary injunction should have been entered in order to stop the City Council from taking further action of Cajun 411's application or to stop the City from issuing a building permit to Cajun 411.

CONCLUSION

Based on the above and foregoing reasons, we reverse the trial court's judgment granting the VCCF's motion for a preliminary injunction. Furthermore, said injunction is hereby dissolved.

REVERSED AND RENDERED