IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JAMES MARTIN, JACOB BURTON, And WYATT GORDON, Petitioners	)	
v.	)	CIVIL ACTION No. 2013CV233740
CITY OF ATLANTA, GEORGIA; a municipal Corporation of the State of Georgia; the ATLANTA BOARD OF ZONING ADJUSTMENT, and its individual board members in their official capacity including LINDA SESSLER, Chair; KARL BARNES; MARTH PORTER; EUGENE MILLER and DANITA M. BROWN and QUIKTRIP CORPORATION Defendants	)	

HEARING BRIEF OF APPELLANTS

I. INTRODUCTION

A. Overview

This appeal challenges the clearly erroneous decision of the City of Atlanta Board of Zoning Adjustment (BZA) to GRANT a Special Exception to QuikTrip to build a 20-pump gas station with almost 30% *more* parking than authorized by ordinance (and 10% more than the Applicant *requested*) in the middle of Atlanta's *most* publicized, *non-automotive*-oriented transportation/development plans in recent memory—the BeltLine Overlay District. Petitioners back up to adjacent property or are cattycorner to the proposed site and will be directly impacted the lights and sounds of this 24-hour a day operation that is already over-scale and over-parked for the BeltLine District. This Court should REVERSE the decision of the BZA because the decision was clear legal error or because the decision constituted a gross abuse of discretion.

The decision was clear legal error because the BZA either is *not* authorized to grant a Special Exception to increase parking in the BeltLine Overlay District or, if the Court construes the City of Atlanta Zoning Ordinance to *allow* the BZA to grant a special exception *for an increase in parking*, the BZA applied the wrong standards to review the application. The decision was a gross abuse of discretion because *even if* the BZA is authorized to grant a special exception it failed to make *any findings* as required by COA Code Section 16-26.002 and no evidence was put forward for such findings. Either basis is grounds to REVERSE the decision of the BZA or, at a minimum to REMAND the matter to the BZA to comply with the City of Atlanta Code.

B. <u>Brief Factual Background</u>

QuikTrip seeks to build a 20-pump gas station at the corners of Chattahoochee Avenue, DeFoors and Howell Mill Road. Petition, ¶ 1; see also Record. Petitioners are residential neighbors to this property located behind adjacent property and cattycorner to the property upon which QuikTrip contemplates this use. There is nothing extra-ordinary about the site itself—it is more or less square, level and easy to build on and, in fact, there are existing buildings on the property which is an assemblage of four (4) tracts of land which had been previously developed (Record). The *sole* reason that QuikTrip seeks this exception is so that it can build a *bigger* gas station than would otherwise be permitted by the BeltLine Overlay District.[1]

1 There is no question—the requirements of the C-1 (COA Zoning Ordinance Chapter 11) and I-1 (COA Zoning Ordinance Chapter 16) zoning districts (the *underlying* zoning) do not place a restriction on the *maximum* amount of parking that the Property can have—that restriction is found solely in Chapter 36—the new BeltLine Overlay District.

In order to further the *express* purposes of the BeltLine Overlay set out in Section 16-36.0022, Section 16-36.020 imposes *both* a *minimum* and *maximum* parking within the BeltLine as follows:

1. *Minimum parking:* The number of off-street parking spaces required shall be as follows:
   a. *For residential uses:* One space per dwelling unit.
   b. *For non-residential uses:* Determined by the underlying zoning except in such cases where the underlying zoning has no minimum parking requirement whereas the minimum parking required shall be one space per 300 square feet of floor area.
2. *Maximum parking:* No development, unless granted a special exception by the board of zoning adjustment, shall have parking in excess of:
   a. *For residential uses:*
      i. 1.25 spaces per each one-bedroom unit.
      ii. 2.00 spaces per each two or greater bedroom unit.
   b. *For non-residential uses:* The greater of the following either:
      i. Ten spaces greater than the minimum parking required; or
      ii. 25 percent of the minimum parking required.

Both C-1 zoning and I-1 zoning have *minimum* parking requiring 1 space per 200 square feet of building. See Chapter 11 and Chapter 16 of the COA Zoning Ordinances, certified copies of which have been filed with the Court. The facility is 5858 square feet (Tab 16). Accordingly, minimum parking is 29 spaces. *Maximum* is the ten (10) additional spaces (the greater of 10 additional spaces or 25% of the 30=(7)). Thus the maximum parking permitted by the BeltLine absent statutory relief is 39. QuikTrip *sought* 59 but later QuikTrip's counsel acknowledged (repeatedly) that his client could live with the 44 originally suggested by Staff. See June 13, 2013 transcript, P. ____, ____ and ____. Despite this acknowledgement that his client did not have to

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2 Section 16-36.001 states: Except where it is otherwise explicitly provided, whenever the following overlay regulations are at variance with said existing underlying zoning regulations, the regulations of this chapter shall apply. (emphasis added).

have any *more* than 44, the BZA voted to grant a "special exception" to 49 spaces. In this they erred and reversal is appropriate.

II. STANDARD OF REVIEW

There is no dispute—the BZA is a quasi-judicial, administrative agency of the City of Atlanta. Its decisions are reviewed on the "any evidence" standard; however, the "any evidence" standard has been clarified by the Georgia Supreme Court in the case of Pruitt Corp. v. Georgia Dept. of Community Health, 284 Ga. 158 (2008)(*abrogating* Emory University v. Levitas, 260 Ga. 894 (1991). There the Georgia Supreme Court made it clear that, "[j]udicial review of an administrative decision requires the court to determine that the findings of fact are supported by "any evidence" **and** to examine the soundness of the conclusions of law that are based upon the findings of fact. Id. at 160 (emphasis added). The Court does not "substitute its judgment for that of the agency as to the weight of the evidence on questions of fact [but] ... [t]he court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings ... are: ... [c]learly erroneous...." Id. (citing Hall v. Ault, 240 Ga. 585, 586 (1978). It is a two-part analysis.

Thus this Court's must analyze *both* parts: (1) were there any facts which supported the findings of fact; and (2) were the conclusions of law based on those findings of fact sound and correct. Id. For example, there may be a "fact" in the record that QuikTrip is a great corporate citizen but that "fact" does not support a finding of fact that there "are extraordinary and exceptional conditions pertaining to the particular piece of property in question because of its size, shape or topography" as is required by COA Zoning Ordinance § 16-26.003 (not that this finding of fact was made). As argued below, the BZA grossly abused its discretion because it *did*

not make the findings contemplated by Chapter 26 of the Zoning Ordinance. Not everything is evidence and not all evidence supports the findings (if any) made by the BZA.

III. ARGUMENTS AND CITATIONS OF LAW

A. The BZA Is Not Expressly Authorized To Grant An "Exception" To Increase Parking Thus The BZA Committed Clear Legal Error.

The problem with the City of Atlanta's decision is that it is not authorized by the Zoning Ordinance. In the absence of such authorization, the action was ultra vires, unlawful and of no force or effect—the essence of clear legal error. In the absence of express, unequivocal language, the Board of Zoning Adjustments constitutionally *cannot* exercise unlimited zoning power. It is an indisputable precept of law that where it is required that the zoning power be exercised by official action of the zoning body of a municipality, it cannot be delegated to administrative officers, boards or individuals. Humthlett v. Reeves, 212 Ga. 8 (1955)(citing Bray v. Beyer, 292 Ky. 162, 166 S.W.2d 290(1); Driskell v. Board of Adjustment, Tex. Civ. App., 195 S.W.2d 594(3); James v. Sutton, 229 N.C. 515, 50 S.E.2d 300(1). As such, delegations of zoning power to boards and agencies "are to be strictly construed against any greater delegation of power than that which clearly appears from the language used." Id. (citing Stout v. City of Clovis, 37 N.M. 30, 16 P.2d 936, 938).[3]

Delegation of *full* legislative discretion in zoning matters would thus prove to be an unconstitutional act absent *very* tightly controlled discretion. Accordingly, in Button Gwinnett Landfill, Inc. v. Gwinnett Cnty., 256 Ga. 818, 819 (1987)(citing Humthlett v. Reeves, 212 Ga. 8, 13 (1955), the Georgia Supreme Court found that because the ordinance delegating authority to a board of appeals listed all the possible variances and the board of appeals simply had to decide

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3 Article IX, Section II, Paragraph IV of the Constitution of Georgia reads, "the governing authority of each county and of each municipality may adopt plans and may exercise the power of zoning ..."

"whether the property strictly complies with the conditions that the governing authority has specified," no violation had occurred. Id. Similarly, in Berkelbaugh v. Green, 258 Ga. 150 (1988), no violation was found because the ordinance required the board to consider six specific conditions when considering a variance application.

In keeping with its constitutional mandate, the City of Atlanta Code *expressly limits* the BZA's authority. Section 6-4029(3) (certified copies of which were filed with the Court) states:

> No exception may be granted for a use of land or building or structure that is prohibited by the Zoning Ordinance of the City of Atlanta.

Section 16-25.002 (Special Permits) further enforces the tightly limited nature of the BZA's authority, stating:

> No such [special] permits shall be required or issued except in classifications *specifically provided for in this part*, or other than in accord with the procedures, standards and requirements set forth in connection therewith

(emphasis added). Thus, the City's Code is abundantly clear—unless the Ordinance *expressly* authorizes a special exception, the BZA does not have authority to grant one. Interpreting the statute this way directly squares with the Georgia Supreme Court's mandate that statutes are to be read to read in a manner to preserve their constitutionality if possible. See generally Bd. of Pub. Educ. for City of Savannah v. Hair, 276 Ga. 575, 576 (2003).

With that backdrop, a review of the Code identifies only two possible "sources" of "authority" for the BZA to grant the special exception for a parking *increase*: Chapter 25 (Special Permits) and Chapter 26 (Variances). Certified copies of *both* chapters have been filed with the Court. Chapter 36 (the BeltLine Overlay) *constitutionally* cannot be the source of authority because it contains *no conditions* for granting a special exception. See COA Code § 16-36.020 and Berklebaugh, *supra.* It is indisputable that Chapter 25 (Special Permits) does not *expressly* authorize a special exception to increase parking—indeed, increasing parking is not

even *mentioned* in Chapter 25. Accordingly, the only credible source for authority for the BZA to grant such an exception is Chapter 26 (Variances) which is the *only* place that language is found addressing *parking*.[4] Section 16-26.006 (Special Exceptions) states:

> In addition to the special exceptions enumerated in chapter 25 which the board of zoning adjustment is empowered to consider, the board may also waive or reduce the parking and loading requirements in any of the districts when the character or use of the building is such as to make unnecessary the full provisions of parking or loading facilities, or where such regulations would impose an unreasonable hardship upon the use of the lot.

Reading the plain language of this section, as the Court must, demonstrates that with this language the City expressly acknowledges that Chapter 25 does not provide for a special exception related to parking because if it had, the City's *inclusion* of Section 16-26.006 in the Code would have been meaningless surplusage. A Court is to read *all parts* of the statute *in pari materia* and is to prefer the interpretation which gives meaning to *all* parts of the statute and which does not render any part of the statute "mere surplusage." See US Bank Nat. Ass'n. v. Gordon, 289 Ga. 12 (2011) (words of statute are not interpreted in insolation but to give effect to all of the statutes' provisions); and Hartford Fire Ins. Co. v. iFreedom Dir. Co., 312 Ga. App. 262 (2011)(courts to avoid constructions that make some language mere surplusage). Courts must give effect to "each part of the statute" and "avoid constructions that make some language mere surplusage or meaningless." J. Kinson Cook, Inc. v. Weaver, 252 Ga. App. 868 (2001).

But this section, Section 16-26.006 does not authorize an *increase* in parking! Looking at the plain language of Section 16.26.006 makes it abundantly clear that it deals with *reductions and waivers, not increases*. Even if the Court concludes that the plain language is somehow capable of broader interpretation, the venerable canons of construction, *noscitur associs* (words

4 Further support for this construction is found in Staff's recommendations, Tab 8, where they recite *this* section as the basis for their review.

are known by their associates)[5] and *expressum facit cessare tacitum* (if some things (of many)[6] are expressly mentioned, the inference is stronger that those omitted are intended to be excluded than if none at all had been mentioned) point clearly to an interpretation that this section speaks to those situations "when the character or use of the building is such as to make unnecessary the full provisions of parking or loading facilities" or otherwise effect a hardship. Section 16-26.006(emphasis added). This language is very clearly speaking to *reducing* the amount of parking *because it is unnecessary* or because imposing the minimum parking would effect a hardship because of the size or shape of the lot.

This section was the only section of the City Code which could be argued to *address* much less *authorize* special exceptions; accordingly, the BZA was *without statutory authority* to grant a special exception to *increase* the parking. Their decision was thus clear legal error and reversal is appropriate.

B. Even If The Court Concludes That Chapter 26 *Authorizes* A Special Exception To *Increase* Parking, The BZA Grossly Abused Its Discretion Because It Did Not Make The Findings of Fact Required By That Chapter.

As set forth in Section A, *supra*, (and as apparently acknowledge by Staff (Tab 8, P. 3) Chapter 26 is the only *possible* source of authority for the BZA which could arguably be construed to permit a special exception to *increase* parking. But authority under Chapter 26 requires the BZA to make *specific findings of fact.* See COA Code Section 16-26.003; see also Section 16-26.001 authorizing the BZA "to hear, grant or deny variances from the terms of this part as will not be contrary to the public interest when, due to special conditions, a literal

5 McKenzie v. Seaboard Sys. R.R., Inc., 173 Ga. App. 402, 404 (1985)(holding that the maxim "*noscitur a sociis*" is as valid today as it was a century ago and citing Mott v. Central R., 70 Ga. 680, 683 (1883)).

6 State v. Peters, 213 Ga. App. 352, 355 (1994)(finding that the exclusion of an office in the statute demonstrated intent to exclude that office from coverage).

enforcement of its provisions in a particular case will result in unnecessary hardship, provided that the spirit of the part shall be observed, public welfare and safety be secured, and substantial justice done." COA Code Section 16-26.003 provides (and provides only one exception):

> (1) *Findings Required:* Except as permitted by the provisions of subsection (2)[7] below, variances may be granted by the board only upon making all of the following findings:
>
> (a) There are extraordinary and exceptional conditions pertaining to the particular piece of property in question because of its size, shape or topography;
>
> (b) The application of the Zoning Ordinance of the City of Atlanta to this particular piece of property would create an unnecessary hardship;
>
> (c) Such conditions are peculiar to the particular piece of property involved; and
>
> (d) Relief, if granted, would not cause substantial detriment to the public good or impair the purposes and intent of the Zoning Ordinance of the City of Atlanta.

Despite this unequivocal mandate (and the constitutional admonition from the Supreme Court in Berklebaugh), the BZA here made *no findings* in accordance with Sections 16-26.003 or 16-26.001. See Record, Tab 1, June 18th letter. One can search the entire transcript (Record) and find no mention of findings in accordance with COA Code Section 16-26.003. Thus, even if the Court concludes that this Section *authorizes* a special exception, the BZA *grossly abused its discretion* (and committed clear legal error by failing to make the express findings *required by Code*) in granting the special exception *without* making such findings.

C. **Even If The Court Concludes That The BZA Was Authorizes To Grant a Special Exception And Forgives The Absence Of Express Findings, There Is No Evidence In The Record Which Supports The Finding Required To Approve The Special Exception**

The Georgia Supreme Court has instructed Trial Courts reviewing an administrative or quasi-judicial decision to engage in a two-part analysis. See Pruitt Corp. v. Georgia Dept. of Community Health, 284 Ga. 158 (2008)(*abrogating* Emory University v. Levitas, 260 Ga. 894

7 Section 2 is inapplicable to this case—that covers variances for the preservation of mature trees.

(1991). The Georgia Supreme Court made it clear that, "[j]udicial review of an administrative decision requires the court to determine that the findings of fact are supported by "any evidence" **and** to examine the soundness of the conclusions of law that are based upon the findings of fact. Id. at 160 (emphasis added). The Court does not "substitute its judgment for that of the agency as to the weight of the evidence on questions of fact [but] ... [t]he court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings ... are: ... [c]learly erroneous...."

Here there is no evidence in the record, in particular, of the facts that would underpin Section 16-26.003(1)(a), Subsection (1)(c) or Subsection (1)(d). The property is an assemblage of four-parcels (Tab 18) which previously have been developed and are reasonably flat. As an assemblage, it already has overcome any "issues" which an individual parcel would have had because of its shape or topography. The only "hardship" that was identified is that unless QuikTrip was able to have more parking, it would not be able to do as much business. The Courts long have rejected *that evidence* as evidence of anything, consistently holding that hardship and detriment is not shown simply by the fact that the property would be more valuable if the zoning request was granted. See generally DeKalb Cnty. v. Dobson, 267 Ga. 624, 626 (1997).[8] Nor was any evidence *other than the evidence put forth by the Petitioners* available to discuss what impact this use would have on the "public good" or how it would "impair the purposes and intent of the Zoning Ordinance of the City of Atlanta."[9] There are no findings and

8 The Georgia Supreme Court there wrote, "Land value always depends upon land use, and it is invariable that a more aggressive use of land by a landowner generally will increase a property's value."DeKalb Cnty. v. Dobson, 267 Ga. 624, 626 (1997).

9 Contrary to the Law Department's assertions of the immateriality of the "purpose and intent" of the relevant ordinances, the specific findings of the BZA are *required to address these very points* by Code.

no facts to support such findings; thus the BZA grossly abused its discretion and reversal is appropriate.

D. **Finally Even If The Court Concludes That The BZA Was Authorizes To Grant a Special Exception And Forgives The Absence Of Express Findings On Everything Else, There Is No Evidence In The Record Which Supports The Finding A Hardship Beyond 44 Spaces.**

Below, QuikTrip was represented by Attorney Carl Westmoreland (Transcript). At Page 3 of the Transcript of the hearing before the BZA, Mr. Westmoreland states, "*we are agreeable with the reduction from what was originally requested to 44 which the staff recommends.*" P. 3, LL11-13; see also P. 4, LL 8-10 ("*we are okay with the staff conditions with regard to the number of parking spaces as I've said."*). Staff *specifically* recommended 44 spaces. There is no other set of facts in the record. Record, Tab 8, P. 3. Thus there can be no assertion that there are facts supporting a "finding of fact" of any "hardship" where both the Applicant and Staff indicated 44 spaces was sufficient. If the Court ignores every other error set forth above, the BZA grossly abused its discretion in not limiting the request to the "hardship" accepted by counsel for QuikTrip. Reversal is appropriate.

CONCLUSION