

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JAMES MARTIN, JACOB BURTON,)
And WYATT GORDON,)
Petitioners)
v.) CIVIL ACTION No. _____
)
CITY OF ATLANTA, GEORGIA; a municipal)
Corporation of the State of Georgia, and)
The ATLANTA BOARD OF ZONING)
ADJUSTMENT)
Defendants)

APPEAL; PETITION FOR REMAND AND OTHER EQUITABLE RELIEF

COME NOW James Martin, Jacob Burton and Wyatt Gordon, and file this Appeal and Petition challenging the June 4, 2015 decision of the Atlanta Board of Zoning Adjustments and for that Petition show the Court as follows:

1.

This suit appeals the June 4, 2015 decision of the Atlanta Board of Zoning Adjustment to grant the application of John Dibernardo for a special exception to permit an increase in total parking on real property located at 901 Chattahoochee Avenue and 1678 and 1690 Howell Mill Road (the Subject Property). It is filed pursuant to section 16-26.007(1) of the code of the city of Atlanta.

2.

Venue and jurisdiction lie in this Court.

3.

Plaintiff James Martin is a natural person capable of suing and being sued. He is the Chair of Neighborhood Planning Unit-D, the Neighborhood Planning Unit having jurisdiction over the subject property. He resides at 764 Verner Street NW, Atlanta, Fulton County, Georgia. He owns property affected by the grant of the special exception and is

specially aggrieved by the decision of which he complains. He appeared below and opposed the application for a special exception.

4.

Plaintiff Jacob Burton is a natural person capable of suing and being sued. He owns the home and resides at 814 Holmes Street, Atlanta, Fulton County, Georgia. His home is located diagonally across Howell Mill Road from the Subject Property. His property is located up-hill from the Subject Property and will be exposed to the increased lights and sounds of the proposed development. He is specially aggrieved by the decision of which he complains. He appeared below and opposed the application for a special exception.

5.

Plaintiff Wyatt Gordon is a natural person capable of suing and being sued. He owns the home and resides at 6 White Street, Atlanta, Fulton County, Georgia. His home is located across Defoor Avenue NW from the Subject Property and will be exposed to the increased lights and sounds of the proposed development. He is specially aggrieved by the decision of which he complains. He appeared below and opposed the application for a special exception.

6.

Defendant CITY OF ATLANTA, GEORGIA, a municipal corporation of the State of Georgia, is capable of suing and being sued. It may be served with summons and process through the Honorable Kasim Reed, its mayor, at his office located at 55 Trinity Avenue, Atlanta, Fulton County, Georgia or, in the alternative, the City of Atlanta Law Department may accept service.

7.

The CITY OF ATLANTA BOARD OF ZONING ADJUSTMENT (hereinafter the "BZA") by and through its individual board members in their official capacity is the reviewing body which heard and granted the application for a special exception. It may be served with summons and process through its Chair, Danita Brown at her home address or, in the alternative, the Law Department may accept service.

8.

On or about April 1, 2015, QuikTrip Corporation, by and through John Dibernardo, filed an application for a special exception permit from the City of Atlanta's Zoning Ordinance, a copy of which is attached hereto as Exhibit A, to increase the allowable number of parking spaces from 43 to 49 spaces to allow for the construction of a new convenience store/gas station. The application was assigned the number "V-15-073."

9.

The Subject Property is zoned C-1 (Community Business District) and I-1 (Light Industrial) and lies in the Beltline Overlay District.

10.

Section 16-36.020 of the Beltline Overlay District Ordinance (part of the Zoning Ordinance) then specifies that:

In addition to the provisions of subsection [16-28.008](#)(7), which shall apply and are incorporated herein the following parking requirements shall apply to all permitted uses. (See also sections [16-28.013](#) and [16-28.014](#).)

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.*

11.

A special exception permit is one of three “special permits” that the BZA administer pursuant to COA Zoning Ordinance Section 16-25.002.

12.

Pursuant to COA Zoning Ordinance Section 16-25.002(3), no special exception permit for increased parking may be issued:

... unless it is determined that in addition to meeting the special requirements set forth within the district within which such special permit is located, satisfactory provisions and arrangements have been made concerning the following, applicable to each application, provided however that where site plans and conditions are attached to special use permits, the site plan and the conditions shall control with respect to the setbacks, lot coverage of the buildings on the site and floor area ratio allowed by such site plans and conditions. Provided further that any decrease of any setback, lot coverage or open space or increase in floor area ratio shall be noted on the site plan and addressed in the appropriate subsection below:

- a. Ingress and egress to the property and proposed structure or uses thereon, with particular reference to automotive and pedestrian safety and convenience, traffic flow and control, and access in case of fire or other catastrophe.*
- b. Off-street parking and loading areas where required, with particular attention to the items in a. above.*
- c. Refuse and service areas.*
- d. Appropriate buffering or screening to alleviate such potentially adverse effects as may be created by noise, glare, odor, lighting, signs or traffic congestion.*
- e. Hours and manner of operations.*
- f. Length of time regarding the duration of such permit, if any.*
- g. Tree preservation and replacement in accordance with the requirements of the City of Atlanta Tree Ordinance.*
- h. Required yards and other open spaces;*

13.

Finally, Section 16-26.006 grants the BZA authority to waive parking requirements in cases of unreasonable hardship or to *reduce* them when they are unnecessary:

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.

14.

The matter came before the City of Atlanta Neighborhood Planning Unit-D which recommended DENIAL of the request based on the absence of hardship.

15.

On June 4, 2015, the matter came before the BZA for a public hearing. The case was listed on the BZA agenda as:

V-15-73 Application of John DiBernardo for a variance to increase the maximum allowed parking (V-13-53) from 43 onsite spaces to 49 onsite parking spaces to allow for the construction of a gas station/convenience store (pending lot approval) for property located at 901 Chattahoochee Avenue, 1656 Defoor Avenue, 1690& 1678 Howell Mill Road, N.W. and 0 Howell Mill Road, N.W. (parcel id 17-01520004015), fronting approximately 253 feet on the west side of Howell Mill Road and beginning at the northwest intersection of Howell Mill Road and Chattahoochee Avenue. Zoned I-1, C-1/BL (Light Industrial, Community Business/Beltline Overlay). Land Lot 152 of the 17th district, Fulton County, Georgia. Owner: Morris N. Habiff & Joan Barton Properties, LLC Council District 9, NPU D

16.

At the June 4, 2015 BZA hearing, the applicant presented no evidence of hardship to support increasing the parking on the site by more than the maximum permitted by the Beltline Overlay District.

17.

At the June 4, 2015 BZA hearing, the Board was instructed by city staff not to consider the matter brought before it, but to grant the exception and only consider whether or not to attach a specific condition to it.

18.

At the June 4, 2015 BZA hearing, the board was informed by staff that variances to the Beltline overlay district's regulations of parking configuration are "often varied due to certain hardships"

19.

The conditions for administrative variance to the Beltline overlay districts parking requirements do not include cases of hardship. These are described in section 16-36.005:

As part of general action when plans require approval of a special administrative permit, the director of the bureau of planning may authorize variations from regulations generally applying based on written findings that either:

- 1. A plan proposed by an applicant, while not strictly in accord with regulations applying generally within the district, satisfies the public purposes and intent, and provides public protection to an equivalent or greater degree; or*
- 2. In the particular circumstances of the case, strict application of a particular regulation or regulations is not necessary for the accomplishment of public purposes or the provision of public protection, at the time or in the future.*

20.

At the June 4, 2015 BZA hearing, testimony was adduced in opposition to the application, which demonstrated that there was no hardship necessitating the proposed increase in parking.

21.

Granting the special exception violated the purpose and intent of the Beltline Overlay District and did not serve the public interest.

COUNT I
REMAND

22.

Paragraphs 1 through 21 are incorporated herein by this reference as if fully restated.

23.

Plaintiffs have a clear legal and constitutional right for this matter to be heard before the BZA and to have a decided based upon relevant findings of fact. As no evidence was presented at the June 4, 2015 BZA hearing of this matter to support the board's decision, remand of this case to the BZA is appropriate.

24.

Defendants' grant of the special exception was not supported by proper evidence addressing each of the enumerated criteria; accordingly, Defendants have grossly abused their discretion in granting the special exception and remand is appropriate.

25.

The City of Atlanta Zoning Ordinance does not permit the grant of a special exception in the absence of an application satisfactorily addressing each of the enumerated criteria.

WHEREFORE, having fully set forth their grounds for relief, Plaintiffs pray this Court:

1. Cause summons and process to issue and to be served upon Defendants;
2. Cause the clerk of the Atlanta Board of Zoning Adjustment to prepare and file with this Court, within 30 days of service of this Petition, a record of the proceedings below including the transcript of the June 4, 2015 hearing;
3. Require Defendants to answer;
4. Find and adjudge in Plaintiffs favor and against Defendants;

5. Find and declare that the City's grant of the special exception was clear legal error and a gross abuse of discretion; and

6. Award such further and other relief as the Court deems just and proper.

Respectfully submitted this 6 day of July, 2015.

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