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OCT 15 2010

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

FILED IN OFFICE
OCT 13 2010
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

LONG ISLAND NEIGHBORHOODS)
COALITION, et. al.,)
)
Plaintiff,)
)
vs.)
)
MAYOR EVA GALAMBOS, et. al.,)
)
Respondents)
)
CITY OF SANDY SPRINGS,)
GEORGIA, a Municipal corporation,)
HOLY SPIRIT PREPARATORY)
SCHOOL, and ANNE BOONE,)
)
Defendants.)

CIVIL ACTION

FILE NO. 2008CV157127
FILE NO. 2008CV159523

JUDGE KIMBERLY M. ESMOND ADAMS

**ORDER DENYING PETITION FOR WRIT OF CERTIORARI
AND OTHER EQUITABLE RELIEF**

This matter came before the Court on Petitioners' Petition for Writ of Certiorari and Other Equitable Relief wherein Petitioners seek reversal of the City of Sandy Springs' grant of a use permit to Defendant Holy Preparatory School to construct a lighted, public-address system equipped recreational field on property located on Long Island Drive in Sandy Springs. Having considered the motions, pleadings, arguments, entire record and the applicable law, the Court finds as follows:

BACKGROUND

A. The Property and Application for a Use Permit.

In January 2008, Defendant Holy Spirit Preparatory School (hereinafter "Holy Spirit"), a private, Pre-K through 12th grade co-educational institution, filed an application (hereinafter "Application") with the City of Sandy Springs, Georgia (hereinafter "Sandy Springs") for a Use

Permit pursuant to the City of Sandy Springs Zoning Ordinance (hereinafter “Zoning Ordinance”). The Application was for approval of a 15,000 square foot school facility (hereinafter “School Building”) and an associated recreational field (hereinafter “Recreational Field”) on a 7.985 acre parcel of land owned by Defendant Anne Boone (hereinafter “Boone Parcel”). The Boone Parcel is located south of 1-285 between Long Island Drive and Lake Forrest Drive within the geographical boundaries of Sandy Springs. The Boone Parcel is zoned CUP (conditional) based upon a 2004 zoning (hereinafter “2004 Zoning”) which included the Boone Parcel and two adjacent properties. One of the adjacent properties consists of an approximately 4.5 acre parcel with frontage on Lake Forrest Drive. The property is owned by Gwinnett Real Estate Trust Ventures; and Fred Filsoof is a partner (hereinafter “Filsoof Parcel”). The other adjacent property is owned by Sandra Pope and consists of an approximately 2 acre parcel with frontage on Long Island Drive (hereinafter “Pope Parcel”). The 2004 Zoning occurred in Fulton County prior to the December 2005 incorporation of Sandy Springs. Each of the three (3) property owners participated in the 2004 Zoning in which the properties were approved CUP (conditional) for development of up to 31 homes based upon certain parameters and conditions. In addition, prior to development of the properties, the owners were required to present and obtain approval of a final development plan consistent with the zoning conditions. In the five (5) years since the zoning action, there has been no development of any of the properties based upon the CUP (conditional) zoning.

The Application to approve a Use Permit on the Boone Parcel was submitted and accepted by Nancy Leathers, the City of Sandy Springs’ Community Development Director. The Application was allowed under Section 19.4.40 of the City of Sandy Spring’s Zoning Ordinance (hereinafter “Zoning Ordinance”) for a private school with an associated recreational field which

is allowed in any zoning district within the City. Section 19.4.40 specifically states:

SCHOOL, PRIVATE OR SPECIAL

A. Required Districts: All

B. Standards:

1. Minimum lot area shall be 1 acre.
2. If located adjacent to a single family dwelling district and/or AG-i district used for single family, the minimum landscape strips, buffers, and improvements setbacks required for the 0-I district as specified in Section 4.23 shall be required.
3. Buildings, and refuse areas shall not be located within 100 feet of a residential district and/or AG-i district used for single family.
4. Active outdoor recreation areas shall not be located within 100 feet of an adjoining residential district or use. Recreational fields, such as playing fields that are accessory to the school do not require a separate Use Permit.
5. Day care facilities in association with the school do not require a separate Use Permit.
6. Parking areas shall not be located within 50 feet of any residential district and/or AG-i district used for single family.
7. Student drop-off and vehicular turn-around facilities shall be provided on the site so that vehicles may re-enter the public street in a forward manner.
8. Permitted curb cut access shall not be from a local street.

Subsequently, pursuant to the Zoning Ordinance, the Application was evaluated by the staff of the Sandy Springs Department of Communication Development (hereinafter "Staff"). The City's Design Review Board and Planning Commission prepared and reviewed a recommendation prior to it being presented to the Mayor and Council at its August 19, 2008 City Council Meeting.

B. August 19, 2008 Meeting.

At the August 19, 2008 City Council meeting, Staff presented its recommendations, and in accordance with O.C.G.A. Section 36-66-1 et.seq. (hereinafter "Zoning Procedures Act"), a public hearing was held at which both opponents and proponents of the Application were

allowed to participate.

Ultimately Councilwoman Jenkins moved to approve the Application which was passed by the City Council by a vote of 4-3. As part of her motion, Councilwoman Jenkins incorporated, with certain modifications, conditions which had been presented by Staff as part of its report to City Council. The modifications included the hours of operation of the School Building and the Recreational Field; however, Councilwoman Jenkins did not expressly revise Condition No. 1(b) which states:

Field house, concession stand, and administrative offices *for athletic department staff only* and associated accessory uses at a density of 1,878.52 square feet per acre or 15,000 square feet, whichever is less. Reception areas and/or assembly halls shall be prohibited. (Emphasis added).

Accordingly, Condition No. 1(b) would have restricted the School Building to administrative offices for athletic department staff only.

C. October 7, 2008 Meeting.

Based upon the actions taken at the August 19, 2008 meeting, when the draft minutes were prepared and submitted to the City Council for review, Councilwoman Karen Meinzen McEnenery objected to the draft because Condition No. 1(b) did not restrict the administrative offices to athletic department staff only. A second draft was created, this time reflecting the verbatim copy of the written conditions from the City Council meeting. Councilwoman Jenkins disagreed with the second version, indicating that she had not intended for the limitation contained in Condition No. 1(b) to only allow athletic administrative uses. Accordingly, it was determined that there was a dispute as to the content of Councilwoman Jenkins' August 19, 2008

motion. The Code of Ordinances of Sandy Springs, Georgia (hereinafter "City Code") contains a provision to address this type of scenario.

Section 2-61 of the City Code entitled "Minutes" provides in subsection (b):

The city council shall approve the minutes before they may be considered as an official record of the city council. The minutes shall be open for public inspection once approved as official by the city council but in no case later than immediately following the next regular meeting of the city council. A copy of the minutes from the previous meeting shall be distributed to the city council at least one business day before the following meeting. The minutes of the previous meeting shall be corrected, if necessary, and approved by the city council at the beginning of each meeting. A majority vote is required for approval. Conflicts regarding the content of minutes shall be decided by a majority vote. Upon being approved, the minutes shall be signed by the mayor and attested to by the clerk of the city council. (Emphasis added).

Subsequently, on October 7, 2008 when the minutes of the August 19, 2008 City Council meeting were submitted for approval, the matter was removed from the Consent Agenda for discussion since there was a conflict regarding the contents of the minutes. Councilwoman Jenkins moved to clarify the minutes of the August 19, 2008 meeting to reflect her stated intent that Condition No. 1(b) only limit the use of the School Building to general administrative uses. Following discussion, a vote was taken to clarify the conflict regarding the minutes resulting in a 3-3 tie. Pursuant to the terms of Section 2-58 of the City Code, Mayor Galambos broke the tie only limiting the use of the School Building to general administrative uses.

CONCLUSIONS OF LAW

A. Count II of Petitioners' Amended Complaint.

At oral argument, counsel for Defendant Holy Spirit orally objected to an amendment filed by Petitioners on February 25, 2010 wherein a second count was added to each petition challenging, in the alternative, the constitutionality of the City's actions. The Court heard brief arguments from Petitioners' counsel that the amendment was filed in response to the arguments of Defendants that the Use Permit process is *legislative*. Petitioners argued, pursuant to Footnote 3 in Dougherty County v. Webb, 256 Ga. 474 (1986), that appeals of *legislative* zoning decisions are *de novo* on the basis of constitutionality of the legislative action. Petitioners' counsel argued that the acts challenged by Count II of the Complaint, the facts and the transaction were all identical and that all of the parties were identical. Thus, pursuant to O.C.G.A. § 9-11-15, Petitioners argued the petition(s) could be amended at any time *prior to* trial and that such amendment relates back. Because Defendants subsequently agreed that the review of Use Permits is quasi-judicial (thereby permitting appeals by way of certiorari) and not *legislative*, and because the Court concludes that Petitioners properly have brought their appeals by way of certiorari, the Court concludes that Petitioners' amendment to their Complaint, adding Count II to each of the Petitions, is **DISMISSED** as **MOOT**.

B. Standard of Review.

Petitioners argue and Defendants acknowledge that this matter is before the Court on its review of a *quasi-judicial* decision. In Dougherty County v. Webb, the Georgia Supreme Court recognized two different kinds of zoning cases: (1) straight-forward constitutional challenges to fully *legislative* rezoning actions; and (2) reviews of special or conditional use permit

applications decided under the existing zoning ordinance. The Georgia Supreme Court pointed out that *regardless* of which type of action is challenged, the Superior Court determines the *law* applicable to the case *anew*. Thus, on review, the Court grants relief to the appellant if it demonstrates either “a clear legal right to the relief sought, or demonstrates to the superior court a gross abuse of discretion.” Here, Petitioners concede that they do not allege a gross abuse of discretion based on the absence of “evidence” filed by the City for both sides. Rather, Petitioners argue that the City has disregarded the clear, unambiguous language of the Zoning Ordinance in granting the application and committed plain legal error warranting reversal.

Both parties have cited to Glover v. Ware in support of their arguments. The Court notes, as Petitioners point out in their argument, the Court of Appeals held that the plain legal error standard of review applies where the appellate court determines *that the issue was of law, not fact, that there was no factual dispute, or that there was no discretion, so that the issue for review was whether the trial court made a plain legal error.* See Glover v. Ware, 236 Ga. App. 40 (1999). The Court, however, is not persuaded by Petitioners’ argument and use of Glover in its application to this case.

Defendants argue that because the Zoning Ordinance is *discretionary* there can be no “clear legal right” to relief. Defendants further argue because the City is even charged with reviewing whether the proposed application violates the law, the City of Sandy Springs thereby has the *discretion* to “disregard its own ordinances.” This case involves the review of a decision regarding a use permit. Accordingly, the courts have held that when considering use permits, local governments are not acting in a legislative capacity regarding the decision, but are instead acting “in a quasi-judicial capacity to determine the facts and apply the law.” See Dougherty County v. Webb, 256 Ga. 474, Fn.3 (1986). Based upon the quasi-judicial nature of the decision,

the court's review is limited to the record and the decision is only overturned if based upon the record an abuse of discretion is found. See Pruitt Corp. v. Georgia Dept. of Community Health, 284 Ga. 158 (2008).

Petitioner's arguments are largely based upon the allegation that the City has misapplied and misinterpreted its Zoning Ordinance. As such, the Court is most persuaded by the recent authority of Fulton County v. Congregation of Anshei Chesed, wherein the Georgia Supreme Court held:

When reviewing a local governing body's zoning decision, the superior court applies the "any evidence" standard of review. Where the decision to grant or deny an application for a special use permit lies within the discretion of the local governing body, a disappointed applicant who seeks mandamus relief from the superior court must show that the local governing body's denial of the special use permit constituted a gross abuse of discretion. In the appellate courts, the standard of review in either case is whether there is any evidence supporting the decision of the local governing body, not whether there is any evidence supporting the decision of the superior court.

See Fulton County v. Congregation of Anshei Chesed, 275 Ga. 856 (2002). Therefore, the Court finds it should not substitute its judgment for that of the City of Sandy Springs absent a gross abuse of discretion. See Northside Corp. v. City of Atlanta, 275 Ga. App. 30 (2005); see also Board of Zoning Adjustment of Atlanta v. Fulton Federal Sav. & Loan Ass'n., 177 Ga. App. 219 (1985).

C. The Zoning Ordinance.

Petitioners argue that pursuant to the Zoning Ordinance: (1) the Recreational Field is not permitted pursuant to the terms of the Zoning Ordinance; and (2) the approval of the use permit on the Boone Parcel caused the Filsoof and Pope Parcels to become non-conforming under the

Zoning Ordinance.

D. The Requirements of Section 19.4.36 Regarding Stand Alone Recreational Fields Are Not Incorporated Into Section 19.4.40 Regarding Recreational Fields Accessory to a School Use.

Petitioners argue that the Recreational Field is not allowed under the Zoning Ordinance because the requirements of Section 19.4.36 regarding stand alone recreational fields are incorporated into Section 19.4.40 governing fields associated and accessory to the operation of a Private or Special School, as those terms are defined by the Zoning Ordinance. Petitioners' argument, however, is flawed. First, the terms of the two sections are meant to govern different situations as illustrated by inconsistencies between the sections. Under Section 19.4.36 regarding stand alone recreational fields, there is a *mandatory* "50-foot buffer and 10-foot improvement setback" from any residentially-zoned property. Under Section 19.4.40, however, the buffers are 25 feet for the sides of the property and 50 feet for the rear of the property with a 10-foot improvement set back. Accordingly, to construe the sections in the manner which Petitioners propose creates an inconsistency regarding the buffer requirements. Adopting an interpretation which creates an internal inconsistency in the Zoning Ordinance would violate a basic rule of construction. See In re J.W. 293 Ga. App. 408 (2008).

Second, in other locations within the Zoning Ordinance when the incorporation of additional sections by reference is contemplated, it is expressly stated. Section 19.4.10 regarding Places of Worship provides an example of how additional use requirements are incorporated in the Zoning Ordinance. Under Section 19.4.10(3), if a Use Permit for a temple, church or other place of worship is sought which incorporates a day care center, private school recreational field, or any use requiring a Use Permit under the Zoning Ordinance, the Zoning Ordinance *expressly states* that the Use Permit must be applied for and approved. As stated above, it is fundamental

rule of construction that documents should be construed for internal consistency. See In re J.W., 293 Ga. App. 408 (2008).

E. The 15,000 Square Foot School Building Constitutes a Principle School Use Along With the Associated Holy Spirit Campus.

Petitioner argues that Section 4.5.1 of the Zoning Ordinance precludes the construction of the accessory recreational field since there is no Private School as defined by Section 3.3.19 on the Boone Property. Section 4.5.1 requires that the accessory structure be constructed contemporaneously or after the primary structure. Accordingly, Petitioner argues that since there are no classrooms for students on the Boone Property there is no primary Private School use of the Boone Property.

The Court notes that physical education is a part of the approved curriculum of the Fulton County School Board and would take place on the Holy Spirit property. Further, nothing in Section 19.4.40 requires that school classrooms be present for the school use to be the primary use. Administrative offices, whether athletic or otherwise, are an integral part of a school's delivery of an educational curriculum thereby satisfying the criteria of Section 3.3.19. Accordingly, the parcel does contain both the school and recreational use. Further, nothing in the Zoning Ordinance requires that the primary and accessory use be on the same or contiguous parcels. It is the nature of being a use associated with and utilized by a school which dictates the appropriate policies for the recreational facility.

F. There Is No Requirement that Each of Boone, Filsoof, and Pope Parcels Had to Be Rezoned Concurrently With the Issuance of A Use Permit.

Petitioners argue that the issuance of the Use Permit for the Boone Parcel was not allowed under the Zoning Ordinance because it broke up the CUP (conditional) zoning of the

three (3) properties. This argument appears, however, to miss the mark. In the instant case, the underlying CUP (conditional) zoning of the three properties remains intact. This is illustrated by Section 19.2.3.2 of the Zoning Ordinance which requires that Use Permits expire if not acted upon in three (3) years. If, in fact, the CUP (conditional) zoning was “broken up,” the expiration of the Use Permit would arguably leave the property unzoned.

Significantly, the parcels are, and have always been, separate parcels and are still subject to the underlying CUP (conditional) zoning. To the extent that the Filsoof and Pope Parcels independently can meet the criteria of the underlying CUP (conditional) zoning, they can be developed as a matter of right. Petitioners’ reliance upon Sections 4.2.3 and 4.2.4 of the Zoning Ordinance related to the subdivision of land is misplaced since the underlying zoning is still intact and the three parcels have never been consolidated into one property. There has been no subdivision in this action.

Furthermore, the 2004 Zoning contemplated the requirement of additional zoning steps prior to development. For instance, prior to development, a revised development plan must be submitted consistent with the requirements of the CUP (conditional) zoning. Petitioners voluntarily participated in the 2004 multi-parcel zoning action. To require the City take a position that it would not accept any rezoning applications without the consent or participation of all of the parties to a previous multi-property zoning action is not feasible. Such action could happen years, if not decades, after the original zoning action. Petitioners could have protected their rights in these circumstances as a matter of contract with the other parties. To require the City to refuse the Application under such circumstances would create an unattainable standard of discerning the contractual rights between the parties in the 2004 Zoning.

G. The Mayor and Council's Action of Clarifying the Minutes as to the Intent of the August 19, 2008 Zoning Action Does Not Violate the Zoning Procedures Act.

Petitioners argue that since there was a conflict in the August 19, 2008 City Council meeting minutes, which was clarified in the October 7, 2008 City Council meeting, the October 7, 2008 meeting violated the Zoning Procedures Act. See O.C.G.A. Section 36-66-1 et. seq. The Court disagrees. There was a *bona fide* disagreement among council members regarding the action taken at the August 19, 2009 meeting. Upon presentation of the original minutes allowing general administrative use of the building, Councilwoman McEnery immediately objected. Upon the presentation of the revised minutes limiting the use to athletic administrative uses, Councilwoman Jenkins immediately objected stating the minutes did not reflect the intent of her motion. Section 2-61(b) of the City Code sets forth the rules regarding the preparation, presentation and approval of minutes of a City Council meeting. Section 2-61(b) reads as follows:

The city council shall approve the minutes before they may be considered as an official record of the city council. The minutes shall be open for public inspection once approved as official by the city council but in no case later than immediately following the next regular meeting of the city council. A copy of the minutes from the previous meeting shall be distributed to the city council at least one business day before the following meeting. ***The minutes of the previous meeting shall be corrected, if necessary, and approved by the city council at the beginning of each meeting. A majority vote is required for approval. Conflicts regarding the content of minutes shall be decided by a majority vote.*** Upon being approved, the minutes shall be signed by the mayor and attested to by the clerk of the city council. (Emphasis added).

Accordingly, based upon Section 2-61, the final step of approving minutes must be completed before the action is “considered as an official record of the city council.” This is also consistent with well established Georgia law on this matter. See Taco Mac v. City of Atlanta Bd. Of Zoning Adjustment, 255 Ga. 538, (1986). Thus, until the minutes of the October 7, 2008 meeting were prepared, reviewed and approved, there was no final action regarding the instant matter.

O.C.G.A. Section 36-66-4(a) sets forth:

A local government taking action resulting in a zoning decision ***shall provide for a hearing*** on the proposed action. At least 15 but not more than 45 days prior to the date of the hearing, the local government shall cause to be published within a newspaper of general circulation within the territorial boundaries of the local government a notice of the hearing. The notice shall state the time, place, and purpose of the hearing. (Emphasis added).

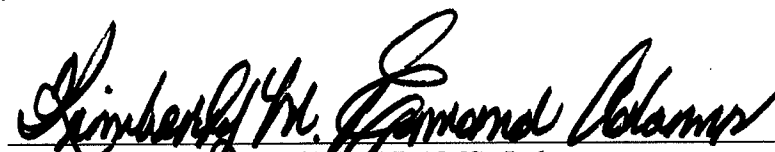
The Zoning Procedures Act only requires one hearing in the zoning process. See O.C.G.A. Section 36-66-4(a); see also City of Cumming v. Realty Development Corp., 268 Ga. 461, 463 (1997). In the instant action, the City actually held two (2) hearings on the matter; one before the Planning Commission and one before the City Council. Further, the consideration of the minutes of the August 19, 2008 meeting, as with the adoption of all minutes at the City, were part of an advertised agenda for the October 7, 2008 meeting. Accordingly, the City was not required to otherwise advertise and hold another hearing on the date of the adoption of the minutes.

CONCLUSION

For the reasons above, Petitioners’ writ is **DENIED**. The August 19, 2008 zoning decision regarding the Use Permit and the minutes, as approved on October 7, 2008, are upheld. Further, the Court hereby enters judgment against Petitioners and in favor of Respondents in

both Civil Action File Nos. 2008CV157127 and 2008CV159523.

SO ORDERED this 11th day of October, 2010.

A handwritten signature in black ink, reading "Kimberly M. Esmond Adams". The signature is written in a cursive style and is positioned above a horizontal line.

KIMBERLY M. ESMOND ADAMS, Judge
Fulton County Superior Court
Atlanta Judicial Circuit

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