

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 1831

DAVID PAUL ROGOZ

VERSUS

THE TANGIPAOA PARISH COUNCIL

Judgment Rendered: May 6, 2011

**Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Tangipahoa, Louisiana
Docket Number 2008-000637**

Honorable M. Douglas Hughes, Judge Presiding

**Hobart O. Pardue, Jr.
Springfield, LA**

**Counsel for Plaintiff/Appellant,
David Paul Rogoz, Sr.**

**Duncan S. Kemp, III
Hammond, LA**

**Counsel for Defendant/Appellee,
Tangipahoa Parish Council**

**Angelique Duhon Freel
Baton Rouge, LA**

**Counsel for the Louisiana Attorney
General,
James D. "Buddy" Caldwell**

BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

WHIPPLE, J.

Plaintiff appeals the trial court's judgment, declaring Chapter 5, Section 5-38 of Tangipahoa Parish Ordinance Number 07-39 constitutional. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On April 24, 2007, plaintiff, David Paul Rogoz, who owns immovable property in Loranger, Louisiana, applied to Tangipahoa Parish for a permit to sell alcoholic beverages at his business, the Double D Saloon. Pursuant to Chapter 5, Section 5-38(b) and (c) of the Tangipahoa Parish Code of Ordinances, as amended on May 14, 2007, by Ordinance Number 07-39, plaintiff was required to obtain written, notarized consent of all adjacent property owners within 500 feet in order to obtain the alcohol permit.¹ However, plaintiff obtained the consent of only four of his five adjacent neighbors, with the fifth neighbor objecting to the issuance of an alcohol permit to plaintiff's neighboring business. Accordingly, plaintiff was not issued a parish alcohol permit.

Thereafter, on February 28, 2008, plaintiff filed a petition for mandamus and declaratory judgment, naming the Tangipahoa Parish Council ("the parish council") as defendant and seeking through a summary proceeding to have Tangipahoa Ordinance Number 07-39, adding Chapter 5, Section 5-38(b) and (c), (at times referred to as "the ordinance") declared unconstitutional and seeking a writ of mandamus ordering the parish council to issue him a permit to sell alcoholic beverages at his business. Plaintiff contended that the requirement in the ordinance at issue that he obtain from

¹The proposed amendment to the ordinance was first introduced at a public meeting of the Tangipahoa Parish Council on April 23, 2007, the day before plaintiff applied for his parish liquor license.

all adjacent property owners written, notarized consent to the issuance of the alcohol permit was “unconstitutional on its face.”

The parish council responded to the petition by filing dilatory exceptions of unauthorized use of summary proceedings and improper cumulation of actions, averring that a suit for declaratory judgment challenging the constitutionality of an ordinance must be brought by ordinary process and that, while a suit for mandamus may be brought by summary proceeding, it may not be cumulated with a suit for declaratory judgment.

Thereafter, plaintiff amended his petition to delete the request for a writ of mandamus and for a summary rule to show cause on the constitutional challenge to the ordinance. Instead, in the amended petition, plaintiff converted the action to an ordinary proceeding and prayed for judgment declaring the ordinance unconstitutional after “the defendant be cited to appear and answer the original petition as amended, and after due proceedings had.”

The parish council then answered the amended petition, and a hearing was conducted before the trial court. Following the hearing, the trial court signed a judgment dated June 2, 2008, declaring the ordinance unconstitutional. In oral reasons for judgment, the trial court stated that the ordinance was “a little too broad to cover the situation.”

On appeal to the Louisiana Supreme Court, however, the Court vacated the trial court’s judgment, finding that the record was “woefully inadequate” for the purpose of allowing the Court to determine whether plaintiff had sustained his burden of proving that the ordinance was unconstitutional and whether the trial court had attempted to construe the statute so as to preserve its constitutionality. Thus, the Court held that the

issue of constitutionality was not properly raised by plaintiff and that the district court acted prematurely in declaring the ordinance unconstitutional. Rogoz v. Tangipahoa Parish Council, 2008-2789 (La. 1/30/09), 21 So. 3d 923, 926. Specifically, the Court noted that a constitutional challenge to an ordinance must be specially pleaded and the grounds for the claim particularized, but that plaintiff had failed in his petitions and at the hearing in the trial court to specify any particular constitutional provision that the ordinance allegedly violated. Additionally, the Court found that there was no indication that the trial court had made a specific determination that resolution of the constitutional issue was essential to the resolution of the case. Rogoz, 21 So. 3d at 925-926.

After the matter was remanded to the trial court, plaintiff again amended his petition, this time averring that the ordinance violated article VI, section 17 of the Louisiana Constitution, although not particularizing the grounds for that assertion. Following a hearing, the trial court signed a judgment dated April 6, 2010, declaring that the ordinance is constitutional. After the denial of his motion for new trial, plaintiff instituted this appeal, listing the following issues for review:

- (1) Whether the ordinance in question is unconstitutional; and
- (2) if the ordinance is deemed constitutional, whether plaintiff should be granted a permit since he has taken all the necessary steps required of him under existing law prior to the parish council's amending the ordinance to require the unanimous consent of all property owners to be issued a permit.

At the outset, we note that in his first amended petition, plaintiff deleted his request for mandamus, wherein he sought an order mandating that the parish council grant him an alcohol permit. Moreover, the only relief he requested in the trial court through his amended petitions was a

declaration that the ordinance was unconstitutional. Issues not submitted to the trial court for decision will generally not be considered by the appellate court on appeal. East Tangipahoa Development Company, LLC v. Bedico Junction, LLC, 2008-1262 (La. App. 1st Cir. 12/23/08), 5 So. 3d 238, 246, writ denied, 2009-0166 (La. 3/27/09), 5 So. 3d 146. Accordingly, the second issue presented by plaintiff is not properly before us, and we will limit our analysis to plaintiff's challenge to the trial court's determination that plaintiff was not entitled to a judgment declaring the ordinance unconstitutional.

DISCUSSION

An ordinance, like any act of the legislature, is presumed to be constitutional. Everhardt v. City of New Orleans, 253 La. 285, 289, 217 So. 2d 400, 401 (1968); Wes-T-Erre Development Corporation v. Parish of Terrebonne, 416 So. 2d 209, 215 (La. App. 1st Cir.), writ denied, 421 So. 2d 251 (La. 1982). Thus, the party attacking it has the burden of establishing by clear evidence that the ordinance is unconstitutional. Wes-T-Erre Development Corporation, 416 So. 2d at 215.

Pursuant to article VI, section 5 of the Louisiana Constitution of 1974, any local governmental subdivision may draft, adopt, or amend a home rule charter, subject to and not inconsistent with the Louisiana Constitution. A home rule charter so adopted shall provide the structure and organization, powers, and functions of the local government, "which may include the exercise of any power and performance of any function necessary, requisite, or proper for the management of its affairs, not denied by general law or inconsistent with this constitution." La. Const. art. VI, §§5(A) & (E). Pursuant to that authority, Tangipahoa Parish adopted its home rule charter effective October 27, 1986, with article I, section 1-05 of the home rule

charter specifically providing that the parish government “shall have the right, power and authority to pass all ordinances requisite or necessary to promote, protect and preserve the general welfare, safety, health, peace and good order of the Parish....”

Moreover, LSA-R.S. 26:493 authorizes parishes and municipalities to enact ordinances regulating the sale or distribution of alcoholic beverages, providing in pertinent part as follows:

Except as limited by the provisions of this Chapter the various subdivisions of the state may regulate but not prohibit, except by referendum vote as provided by Chapter 3 of this Title or by legally authorized zoning laws of municipalities, the business of wholesaling, retailing, and dealing in alcoholic beverages. No parish or municipality shall, in the exercise of its police power, regulate the business of selling such beverages more than is necessary for the protection of the public health, morals, safety, and peace.

This statute authorizes parishes and municipalities to regulate by ordinance the sale or distribution of alcoholic beverages if such ordinances are necessary for the protection of the welfare of the community, even if such ordinances go beyond the provisions found in Title 26 or in other state laws. Vonderhaar v. Parish of St. Tammany, 633 So. 2d 217, 221 (La. App. 1st Cir. 1993).

Thus, pursuant to the authority granted to it by the Tangipahoa Parish home rule charter and LSA-R.S. 26:493, the parish council enacted Tangipahoa Parish Council Ordinance Number 07-39, which amended Chapter 5, Section 5-38 of the Tangipahoa Parish Code of Ordinances, by adding subsections (b) and (c), relative to restrictions on the locations of establishments selling alcoholic beverages, as follows:

Sec. 5-38. Location of establishments restricted.

(b) Any facility (bar, tavern, lounge, etc.) selling alcoholic beverages in a residential area in open containers for consumption on premises within five hundred feet (500') of any

adjacent property shall have written, notarized consent of adjacent property owners. If said facility does not meet the requirements of this ordinance, permit will be prohibited. This excludes convenience stores or any facility selling packaged liquor which will not be consumed on premises. This does not apply to any facility that is already permitted.

(c) The written, notarized consent of adjacent property owners shall be submitted as part of the application to the T. P. Sheriff's Office for Beer, Wine & Liquor Permit.

In challenging the above-quoted provisions of the ordinance, plaintiff averred in his second amended petition simply that these provisions violated article VI, section 17 of the Louisiana Constitution. As set forth in article VI, section 17:

Subject to uniform procedures established by law, a local governmental subdivision **may** (1) adopt regulations for land use, zoning, and historic preservation, which authority is declared to be a public purpose; (2) create commissions and districts to implement those regulations; (3) review decisions of any commission; and (4) adopt standards for use, construction, demolition, and modification of areas and structures. Existing constitutional authority for historic preservation commissions is retained. (Emphasis added).

In arguing that sections (b) and (c) of the ordinance violate La. Const. art. VI, sec. 17, plaintiff avers that Tangipahoa has not adopted "zoning regulations subject to uniform procedures," and thus seemingly contends that because the parish has not adopted zoning regulations, the parish council was without authority to adopt the sections of the ordinance at issue regulating the sale of alcoholic beverages.

However, this argument was rejected by this court in Olde Nawlins Cookery, L.L.C. v. Edwards, 2009-1189 (La. App. 1st Cir. 5/3/10), 38 So. 3d 1012, 1016-1017, wherein the court noted that the language of article VI, section 17 of the Louisiana Constitution employs the term "may" and thus is permissive. As such, it does not mandate that a parish enact a scheme of zoning regulations. Moreover, there is nothing in the ordinance in conflict

with the provisions of La. Const. art. VI, sec. 17. Olde Nawlins Cookery, L.L.C., 38 So. 3d at 1017.

Indeed, we find nothing in the language of article VI, section 17 of the Louisiana Constitution which would prohibit a parish or municipality from enacting ordinances regulating the sale of alcoholic beverages simply because the parish or municipality has not exercised its prerogative to adopt zoning regulations pursuant to that constitutional provision. The mere fact that a parish does not have a zoning ordinance does not preclude it from enacting an ordinance regulating the sale of alcoholic beverages pursuant to its authority as recognized by La. Const. art. VI, §§5(A) & (E), its home rule charter, and LSA-R.S. 26:493. See Olde Nawlins Cookery, L.L.C., 38 So. 3d at 1017; also see generally La. Op. Att’y Gen. No. 95-280, p. 2 (1995).

Accordingly, we find no error in the trial court’s conclusion that plaintiff failed to prove by clear evidence that Tangipahoa Parish Council Ordinance Number 07-39, amending Chapter 5, Section 5-38 of the Tangipahoa Parish Code of Ordinances to add subsections (b) and (c), violates La. Const. art. VI, sec. 17 and, thus, that the ordinance is unconstitutional.²

²Although not specially pleaded or particularized in his petitions, at the hearing below, plaintiff briefly asserted, and the trial court rejected, the argument that the ordinance is unconstitutionally vague in that it fails to define “residential area.” However, this court likewise rejected this vagueness argument in Olde Nawlins Cookery, L.L.C., finding that the term “residential area” as used in the ordinance at issue herein was not vague. 38 So. 3d at 1016. Rather, the generally prevailing meaning of the term “residential area” would include an area wherein there are structures used as residences or for occupation by residents. See Olde Nawlins Cookery, L.L.C., 38 So. 3d at 1016. Accordingly, this argument also lacks merit.

Moreover, to the extent that plaintiff asserts other arguments in his appellate brief that were not specially pleaded or presented to the trial court for determination, we decline to address them herein.

CONCLUSION

For the above and foregoing reasons, the April 6, 2010 judgment is hereby affirmed. Costs of this appeal are assessed against plaintiff, David Paul Rogoz.

AFFIRMED.