

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 0067

EAST FIRST STREET, L.L.C., AND
M & B RENTALS OF AMERICA, L.L.C.

VERSUS

BOARD OF ADJUSTMENTS AND CITY OF THIBODAUX

Judgment rendered February 9, 2007.

On Appeal from the 17th Judicial District Court
Parish of Lafourche, State of Louisiana
Civil Number 101760; Division "C"
The Honorable Walter I. Lanier, III, Judge Presiding

Woody Falgoust
Thibodaux, LA

Counsel for Plaintiffs/Appellants
East First Street, L.L.C., and
M & B Rentals of America, L.L.C.

Clayton E. Lovell
Houma, LA

Counsel for Defendants/Appellees
City of Thibodaux and the Board
of Adjustments of the City of Thibodaux

David W. Ardoin
Thibodaux, LA

Counsel for Intervenors/Appellees
Guy Diebold, Catherine Diebold, David
Middleton, Francine Middleton, Chester
Boudreaux, Anne Boudreaux and Mary Duplantis

Rusty J. Savoie
New Orleans, LA

Counsel for Intervenors
Cornel Martin and Cynthia Graham Martin

BEFORE: GUIDRY, PETTIGREW, DOWNING, HUGHES, AND WELCH, JJ.

Downing, J. concurs.
Hughes, Jr. dissents.

PETTIGREW, J.

East First Street, L.L.C. and M & B Rentals of America, L.L.C. (“East First Street”) appeal a judgment denying their petition for writ of mandamus and damages. The trial court found that East First Street had not proven its entitlement to its land use variance requests. For the following reasons, we affirm.

PERTINENT FACTS AND PROCEDURAL HISTORY

This appeal involves a filling station located on a well-traveled highway in Thibodaux, Louisiana, across from a residential neighborhood. The station sits in an area zoned R-1 residential, but is allowed to continue as a filling station as a grandfathered-in nonconforming use. When East First Street sought a permit to sell alcoholic beverages, the City of Thibodaux’s Finance Department denied the request because the sale of alcohol is generally not permitted in areas zoned R-1, and the Finance Department did not know whether the sale of alcoholic beverages was permitted under the zoning ordinances’ definition of a “filling station.”

East First Street then filed an application for a variance with the Board of Adjustments of the City of Thibodaux (“Board”). The application for variance requested that the Board overturn the Finance Department’s denial of East First Street’s application for a retail alcoholic beverage permit to sell alcoholic beverages. It also requested that East First Street be granted a variance to spend the money necessary to renovate the property, an amount in excess of that permitted by ordinance.

On June 13, 2005, pursuant to La. R.S. 33:4727, East First Street filed a petition in the district court against the Board and the City of Thibodaux (“City”) for writ of certiorari, for writ of mandamus, and for damages with the district court. The petition requested that the court review the decision of the Board denying the application for variance filed June 6, 2005.

The matter was set for hearing on August 15, 2005. On August 12, 2005, however, East First Street filed an amended petition to add a claim against the

Board of Planning and Zoning of the City of Thibodaux requesting the district court to review the decisions denying the applications for change in zoning from R-1 to C-1 or R-4, filed June 29, 2005 and July 26, 2005.

The matters raised in the original petition, but not the amended petition, were heard at the hearing on August 15, 2005. The record was left open for additional evidence. A group of neighborhood citizens¹ were allowed to file an intervention. They submitted a brief in support of the position taken by the Board and the City. The district court rendered judgment on December 2, 2005, denying East First Street's petition for writ of mandamus and damages, as follows: "IT IS ORDERED ADJUDGED AND DECREED that plaintiff's Petition for Writ of Mandamus and Damages is hereby DENIED at plaintiff's cost."

The district court granted an appeal from this judgment. This court on its own motion issued a show cause order directing the parties to show cause why the appeal should not be dismissed for lack of "appropriate judgment language" in that the judgment did not "contain language *disposing of and/or dismissing* the claim(s) of the petitioner." In response, the district court signed an amended judgment that did not change any decretal language, but did add a certification that the judgment was final after an express determination that there was no just reason for delay. Another panel of this court recalled the show cause order and maintained the appeal.

On appeal, East First Street raises six assignments of error, summarized as follows:

1. the district court erred in applying the appropriate standard of review by disregarding the difference between law and fact, failing to look at competent evidence, failing to use proper zoning law interpretation principles, and in failing to recognize the Board's bias;
2. the City did not have authority to deny East First Street a retail alcohol permit on zoning grounds when the zoning ordinances do not set criteria

¹ Guy Diebold, Catherine Diebold, David Middleton, Francine Middleton, Chester Boudreaux, Anne Boudreaux, and Mary Duplantis were allowed to intervene. They aligned themselves with the City and with the Board's decision, both in the district court and in this court.

Cornel and Cynthia Graham Martin also filed a petition to intervene, but the record contains no order allowing this intervention. See La. C.C.P. art. 1033. In the filed petition, the Martins align themselves with East First Street on the rezoning issue. They have filed no briefs with this court.

for issuance of such permits, and the City has granted such permits to all East First Street's competitors;

3. the Board's decision to deny the alcohol permit was illegal because the Board ignored the zoning ordinance's definition of a "filling station," which definition authorized the sale of alcohol as a "convenience good," as sold at all competitors' stores;
4. the Board's decision to deny a hardship variance to sell retail alcohol was illegal because the Board ignored the four factors outlined in the zoning ordinances and further ignored objective facts and expert evidence;
5. the Board's decision to deny East First Street the opportunity to renovate their derelict property was illegal and senseless;
6. the trial court erred in denying East First Street's costs under La. R.S. 33:4727E(5) because of the Board's gross negligence and bad faith in making its decisions.

DISCUSSION

Legal Precepts & Facts Established By Record

This matter commenced in the district court pursuant to La. R.S. 33:4727E, which allows a person aggrieved to file a petition "setting forth that the decision is illegal, in whole or in part, specifying the grounds of the illegality." The court may then allow a writ of certiorari directed to the Board of Adjustment to review the decision of the Board. The court is authorized to take additional evidence if it thinks it necessary. The court may reverse or confirm, wholly or in part, or may modify the decision brought up for review.

Boards of Adjustment, as defined under La. R.S. 33:4727, are clearly quasi-judicial in nature and function. **State ex rel. Bringhurst v. Zoning Bd. of Appeal and Adjustment**, 198 La. 758, 763-64, 4 So.2d 820, 821 (1941). The Board has no interest in a proceeding other than to decide the question presented for determination according to the proven facts and applicable law. **Id.**, 198 La. at 764, 4 So.2d. at 822.

Actions taken under comprehensive land use regulatory ordinances are violative of due process, therefore illegal, if they are arbitrary, capricious, and unreasonable. **Christopher Estates, Inc. v. East Baton Rouge Parish**, 413 So.2d 1336, 1338 (La.App. 1 Cir. 1982). Further, it is improper to deny a zoning variance to which an applicant is clearly entitled. See **Reeves v. North Shreve**

Baptist Church, 163 So.2d 458, 462 (La.App. 2 Cir. 1964). Such action is subject to review as an illegality. **Lakeside Day Care Center, Inc. v. Board of Adjustment, City of Baton Rouge**, 121 So.2d 335, 338 (La.App. 1 Cir. 1960). "A person who purchases land with knowledge, actual or constructive, of the zoning restrictions, which are in effect at the time of such purchase, is said to have created for himself whatever hardship such restrictions entail." **Sanchez v. Board of Zoning Adjustments**, 488 So.2d 1277, 1279 (La.App. 4 Cir.), writ denied, 491 So.2d 24 (La. 1986), cert. denied, 479 U.S. 963, 107 S.Ct. 461, 93 L.Ed.2d 406 (1986).

Reviewing courts do not consider whether the district court manifestly erred in its findings, but whether the zoning board acted arbitrarily, capriciously or with any calculated or prejudicial lack of discretion. **King v. Caddo Parish Commission**, 97-1873, pp. 14-15 (La. 10/20/98), 719 So.2d 410, 418.

Factually, the record reflects that the site in question in this case operated as a garage/gas filling station, owned by Texaco, leased to an operator. It was not a convenience store, nor did it sell alcoholic beverages. At that time the property was unzoned. In 1979, the City enacted a zoning ordinance and zoned the property as residential only, nonconforming use as a gas filling station. The record does not reflect any evidence of opposition to this zoning in 1979.

In 1981, Ronald P. Delaune and his wife operated the facility as Ron's Texaco, by virtue of a lease from Texaco. Mr. Delaune was aware at that time it was zoned residential only, nonconforming use as a gas filling station. On January 17, 1989, Mr. and Mrs. Delaune purchased the property and continued to operate the facility as a gas filling station. While the Delaunes did sell small amounts of soft drinks, snacks, and cigarettes, they did not sell alcoholic beverages, and the facility was not operated as a convenience store.

In 1998, the Delaunes made a loan from a local lender for operating costs of their filling station. This loan was secured by the pledge of certificates of deposits owned by Bernie Lafaso. The Delaunes used up their line of credit, defaulted, and the certificates of Bernie Lafaso were utilized by the lender to

satisfy the debts of the Delaunes. In order to satisfy their indebtedness to Mr. Lafaso, the Delaunes sold the facility on January 28, 2005, to M & B Rentals of America, L.L.C.; the majority owner of said entity being Bernie Lafaso. On May 17, 2005, M & B Rentals, L.L.C. sold the property to its solely owned subsidiary, East First Street, L.L.C. M & B Rentals of America, L.L.C., East First Street, L.L.C., and their owners at the time of acquisition were fully aware the property was zoned R-1 residential, nonconforming use filling station. Subsequent to the purchase by East First Street, L.L.C., the present litigation began.

Renovation Expenses in Excess of
Permitted Amount

The property at issue is allowed to continue as a filling station in an R-1 zone as a nonconforming use under the City's zoning ordinance. Article IV, §406 of Ordinance 1034, the City's zoning ordinance, addresses repairs and maintenance of nonconforming property. This section permits repairs of nonconforming property in any 12-month period "to an extent not exceeding 10 per cent of the current replacement cost . . . provided that the cubic content existing when it became nonconforming shall not be increased." East First Street sought a variance to spend more than this amount to renovate and upgrade its building, without expanding the size of the building.

The Board denied this request without reasons. The district court affirmed this decision as being within the Board's discretion. We agree and affirm the judgment of the trial court in this regard.

The district court cited testimony to the effect that a "convenience store"² was not consistent with R-1 zoning in addition to concerns the proposed improvements would result in increased traffic and disturbances to the surrounding neighborhood. The district court further observed that the terms of the zoning ordinances mandate that nonconformities are not to be enlarged

² Throughout the record references are made to "convenience stores" and to "filling stations." By request for admission, the Board and City admitted that the City makes no distinction between a garage attachment filling station and a convenience store filling station. These entities further admitted that there is no separate classification for convenience stores and that no gas outlets are licensed as "convenience stores."

upon, expanded, or extended. Article IV, §401 provides in pertinent part as follows:

It is the intent of this ordinance to permit these nonconformities to continue until they are removed but not to encourage their survival. It is further the intent of this ordinance that nonconformities shall not be enlarged upon, expanded or extended, nor be used as grounds for adding other structures or uses prohibited elsewhere in the same district.

The record contains ample evidence showing that the Board's decision was based on reasonable grounds and was not an abuse of discretion. Accordingly, we find no merit in East First Street's fifth assignment of error.

Retail Alcohol Beverage Permit and Convenience Store

We will now address East First Street's assignments of error one through four together, because they are interrelated.

In Article V, Schedule of District Regulations, adopted, of the City of Thibodaux's zoning ordinance, the zoning districts are established as indicated in the ordinance, which we re-state summarily and in pertinent part as follows:

1. R-1 Residential: this district is intended for single family, low density residential living only.

Principally permitted. Single-family detached dwelling units, temporary construction buildings, public outdoor recreation, private gardens but only when plants, flowers, or produce are not advertised for sale or grown in the front yard, agricultural uses but not to include any type of processing, accessory buildings, or uses customarily incidental to the above uses.

Conditionally permitted. Religious institutions, home occupations.

2. R-2 Residential: this district allows both single-family and multiple-family dwellings, and a limited amount of services that are compatible with residential living. Density is determined and controlled by lot sizes.

Principally permitted. All "principally permitted" uses of the R-1 district, multiple-family dwelling units, cemeteries, home occupations, single offices for personal, professional, and medical services.

Conditionally permitted. Religious institutions, grocery stores, mobile homes (one per lot only).

3. R-3 Residential: this district is similar to the R-2 district and additionally allows for limited amount of commercial activity of the type that is compatible with residential living.

Principally permitted. All "principally permitted" uses of the R-2 district, commercial (retail) uses limited to the following: grocery stores, banks, florist shops, savings and loan institutions, hobby shops, gift shops, studios (art, dance,

health, and photography), funeral homes, religious institutions, outdoor advertising.

Conditionally permitted. Filling stations, car washes, public buildings and uses, motels, bars and lounges, animal hospitals, feed stores, furniture and appliance stores, restaurants (indoor service only), TV sales and service, automobile repairs and services, washateria, mobile homes (one per lot only).

4. R-4 Residential: this district is similar to the R-3 district, but additionally allows for one mobile home per lot and further allows for a greater variety of commercial activity of the type that is compatible with residential living.

Principally permitted. All "principally permitted" uses of the R-3 district including but not limited to the following commercial (retail) uses: car washes, cabinet work, sign shops, washateria, heating and air conditioning sales and services, furniture and appliance stores, restaurants (indoor service only), TV sales and service, paint and hardware stores, restaurant equipment sales, automobile repairs and service, mobile home (one per lot only), college and university buildings and uses, boarding and rooming houses, hospitals, public buildings and uses.

Conditionally permitted. Filling stations, motels, bars and lounges, animal hospitals, feed stores.

5. C-1 Commercial
6. C-2 Commercial
7. C-3 Commercial
8. M-1 Industrial
9. M-2 Industrial

East First Street had submitted an "Application for Retail Alcohol Beverage Permit" to the City's Finance Department. In denying the application, the Finance Department noted that the sale of alcohol was not permitted in an R-1 zone and that it lacked information regarding whether sale of alcohol was a nonconforming use and whether the sale of alcohol came within the zoning ordinance's definition of a filling station. In explaining the decision at the hearing before the Board, a representative of the Finance Department stated the Department was not willing to decide whether the sale of alcohol came within the definition of a filling station because it thought the Board was charged with interpretation of the zoning ordinance.

Article XVIII of the City's zoning ordinances provides the following definition of a "filling station," in pertinent part:

Filling Station: Buildings and premises where gasoline, oil, grease, batteries, tires, and automobile accessories may be supplied and dispensed at retail, and where in addition the following services may be rendered and sales made, and no other:

- ...
- (12) Sales of cold drinks, packaged foods, tobacco, and similar convenience goods for filling station customers, as accessory and incidental to principal operation[.]

In support of its assertion that alcoholic beverages were a convenience goods accessory and incidental to the operation of the filling station, East First Street offered the expert testimony and report of Dr. Chris Cox. In his report Dr. Cox noted that alcohol, and in particular, beer, is second among all product categories in sales. He further testified that all of the direct competitors of East First Street sell alcoholic beverages and that all filling station stores in the Thibodaux area that sell convenience items sell alcoholic beverages. Dr. Cox asserted that the sale of alcoholic beverages, and in particular, beer, is critical to a modern convenience store. In his testimony before the Board, Dr. Cox explained that cigarettes and beer are the two top categories of in-store sales, while gasoline accounted for 60-70 percent of the overall sales. It was the opinion of Dr. Cox that customers expect these items. Dr. Cox further opined that the sale of alcohol is necessary for the survival of modern gasoline sales outlets, though the sale of gasoline is still principal. He further testified that there is not a single location along La. 1 or La. 308 in the Thibodaux area that sells convenience items that does not also sell beer.

To rebut East First Street's argument that all of its filling station competitors are allowed to have convenience stores that sell alcoholic beverages, the City introduced the zoning map of the City of Thibodaux, with "x" marks, showing the location of fifteen filling stations with convenience stores within the City of Thibodaux. Six of these locations fell within a C-2 zone as defined by the zoning ordinance of the City of Thibodaux, four fell within a C-3 zone, one fell within a C-1 zone, three fell within an R-2 zone, and one (that being the filling station owned by East First Street) fell within an R-1 zone. The City of Thibodaux's zoning ordinance provides for the sale of gasoline, convenience stores, and the sale of alcoholic beverages with a properly issued retail alcoholic beverage permit within areas zoned C-1, C-2, and C-3.

This evidence also showed that one of the stores, Danny & Clyde's, was originally located in an R-3 residential zoning district, which permits grocery stores, and the retail sale of gasoline and alcoholic beverages. This district was rezoned to an R-2 residential zoning district, and Danny & Clyde's, being grandfathered in, is allowed to operate as a nonconforming use in that district. Exxon, located on La. 308, was originally located and operated outside the city limits of Thibodaux, which was not subject to the zoning ordinance. When the area was incorporated into the city limits of Thibodaux, it came into the City as an R-2 residential zoning designation; however, due to its prior existence, was grandfathered in and is allowed to operate in that zone as a nonconforming use. Tosky's, also, is operating in an R-2 residential zoning district as a nonconforming use. It was granted a variance to sell sandwiches, but not alcoholic beverages. None of these locations have been granted variances to obtain a liquor license to sell alcoholic beverages or to renovate in order to operate a convenience store as requested by First East Street.

The City of Thibodaux and the intervenors/appellees also presented evidence that demonstrated that the East First Street site, which is in an R-1 zone, is in very close proximity to a local high school, church, and Nicholls State University.

East First Street also argues that the definition of a "filling station" under Article XVIII, subpart 12, allows the sale of alcohol under "sales of cold drinks" and similar "convenience goods for" filling station. The zoning ordinance itself does not define what is meant by the term "cold drinks." What a cold drink is, is subject to individual perspective and interpretation. *Miriam Webster's Collegiate Dictionary, 11th Ed.*, defines "drink" as 1) a: a liquid suitable for swallowing; b: alcoholic beverages; 2: a draft or portion of liquid". "Cold beer" is not necessarily excluded from the common definition of cold drink. However, cold beer is an alcoholic beverage, and the sale of alcoholic beverages has long been restricted and regulated under legitimate exercise of police powers by the state, parish, and city governments in the State of Louisiana. Further, there is no

evidence that the sale of alcoholic beverages is accessory and incidental to the principal operation of a filling station -- which is, by definition, the sale of gasoline, oil, grease, batteries, tires, and automobile accessories, as defined by the zoning ordinance for the City of Thibodaux.

East First Street also argues that the City of Thibodaux's zoning ordinance does not define or mention convenience stores. Although the ordinance does not specifically mention convenience stores, it does mention grocery stores. Grocery stores are prohibited and not allowed in R-1 residential designated areas under the Thibodaux zoning ordinance. Grocery stores are conditionally permitted in R-2 residential areas. East First Street is located in an R-1 residential zoning area. "Convenience store," as defined by *Miriam Webster's Collegiate Dictionary, 11th Ed.*, is "a small often franchised market that is open long hours". "Market" is partially defined as "1 a(1): a meeting together of people for the purpose of trade by private purchase and sale and usually not by auction; (2): the people assembled at such a meeting; b(1): a public place where a market is held especially a place where provisions are sold at wholesale (a farmer's market); (2): a retail establishment usually of a specified kind." A "grocer" is defined as "a dealer in staple food stuff, meats, produce, and dairy products, and usually household supplies." In the context of the unique facts of this case, in reality, a convenience store is nothing more than a small grocery store.

Let us not forget that East First Street's property is a nonconforming use in an R-1 residential zone. East First Street was fully aware of the status of the property when it purchased it, as were the previous owners, the Delaunes. The facility that East First Street acquired never sold alcoholic beverages, did not have a retail liquor license, and did not operate as a convenience store. The sale of alcoholic beverages and the operation of a convenience store or grocery store is prohibited in areas zoned R-1 residential by the zoning ordinance of the City of Thibodaux. Article IV, §401, Intent, of the City of Thibodaux zoning ordinance, in part, provides as follows:

Nonconforming uses are declared by this ordinance to be incompatible with permitted uses in the districts involved. A nonconforming use of a structure, a nonconforming use of land, or a nonconforming use of structure and land in combination shall not be extended or enlarged after passage of this ordinance by attachment on a building or premises of additional signs intended to be seen from off the premises, or by the addition of other uses, of a nature which would be prohibited generally in the district involved. (Emphasis added.)

To allow East First Street to acquire a liquor license and sell alcohol and to establish a convenience store on the premises would be in violation of Article IV, §401, which prohibits expansion of a nonconforming use and uses prohibited elsewhere in the R-1 residential district.

After a thorough review of the record and exhibits introduced, we find the record contains ample evidence showing that the Board's decision was based upon reasonable grounds and was not an abuse of discretion, nor arbitrary and capricious. We further find that the trial court did not commit any manifest or legal error; therefore, we find no merit to these assignments of error argued by East First Street.

Costs

East First Street also asks for costs from the Board because it alleges the Board acted with gross negligence and bad faith in making its decisions in this matter. Louisiana Revised Statutes 33:4727E(5) provides that, "Costs shall not be allowed against the board unless it appears to the court that it acted with gross negligence, in bad faith, or with malice in making the decision appealed from."

Because of our previous findings, we conclude the Board did not act with gross negligence, bad faith, or with malice in making its decisions. Further, we conclude the trial court did not err in failing to assess costs against the Board. This sixth assignment of error lacks merit.

DECREE

For the foregoing reasons, we affirm the judgment of the district court and assess all costs of this appeal to East First Street.

AFFIRMED.