

IN THE SUPREME COURT OF MISSISSIPPI

VINEYARD INVESTMENTS, LLC d/b/a
THE WINE PEDDLER

APPELLANT

VS.

NO. 2008-CA-00325

CITY OF MADISON, MISSISSIPPI

APPELLEE

APPELLANT'S BRIEF IN REPLY TO THE BRIEF OF APPELLEE

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APPELLANT'S BRIEF IN REPLY TO THE BRIEF OF APPELLEE

Vineyard Investments (hereinafter "Vineyard") applied for a building permit from the City of Madison for the purpose of finishing out the interior of a existing building leased to Vineyard by Kroger Limited Partnership I for the purpose of operating a package retail liquor store. The City of Madison ("Madison") denied the building permit to Vineyard and stated the reason for denial being that Vineyard had not yet obtained a permit to operate a retail package liquor store from the State Tax Commission.

Madison has failed to rebut the position of Vineyard that the application of the building permit complied with all existing building codes and zoning ordinances of the City of Madison. Because Madison could not establish that Vineyard's application for building permit was not in compliance with existing building codes and zoning ordinances, Madison attempts to persuade this Court that the denial of the building permit was justified for the reason that Vineyard did not have the necessary alcoholic beverage control permit from the State Tax Commission (ABC Permit) at the time Vineyard submitted its application for building permit.

The fallacy of Madison's argument is that the purpose of the building permit was to make improvements to the interior of an existing building, not to sell alcoholic beverages. Madison attempts to support its argument by citing § 67-1-9 of the Mississippi Code Annotated (1972), which makes it unlawful for any person to sell alcoholic beverages except as authorized by state law pursuant to § 67-1-1 *et seq.* of the Mississippi Code Annotated known as Local Option Alcoholic Beverage Control Laws. Vineyard agrees that it cannot sell alcoholic beverages without a permit. However, making improvements to a building is not the same thing as selling alcoholic beverages. Once the necessary improvements were made to the premises, Vineyard does intend to operate a

retail package store and concedes that an ABC Permit is necessary prior to being able to sell alcoholic beverages. Madison attempts to persuade the Court that constructing or improving a building for the purpose of operating a retail package store selling alcoholic beverages is an unlawful use unless an ABC Permit is obtained first. Madison is attempting to regulate the use of the premises which is governed by existing zoning ordinances. Madison has failed to point out how Vineyard's application violated any existing zoning ordinances of the City. In addition, the attempt to regulate the use of the premises by Vineyard is preempted by state law. Attorney General Opinion Number 97-0139 issued April 25, 1997, addressed the issue of preemption of regulation of permitted package stores within a city by state regulations as follows:

Municipalities may not adopt zoning ordinances which further restrict the location of permitted package stores within the City, as these ordinances would be inconsistent with state law. Therefore, the planning commission of the City of Horn Lake pursuant to a zoning ordinance may not deny a conditional use permit to an owner of a package store who has obtained a license to sell alcoholic beverages from the State Tax Commission. While municipalities may not regulate the sale of alcoholic beverages by lawfully permitted package stores, municipalities may restrict businesses from permitting the consumption of alcoholic beverages during specific hours. Citing *Maynard d/b/a Kountry Klub and Western Connection*, 691 So. 2d 385.

Madison cites §17-1-19 of the Mississippi Code Annotated (1972) in support of its position. Said section is a statute contained within Title 17, Chapter 1 of the Mississippi Code entitled "Zoning, Planning and Subdivision Regulation". Mississippi Code Annotated §17-1-19 cited by Madison entitled "Remedies of Local Governing Authorities" empowers a municipality to institute any appropriate action or proceedings to prevent unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance or use, to restrain, correct or abate such violation, to

prevent the occupancy of said building, structure or land, or to prevent any illegal act, conduct, business, or use in or about such premises which are in violation of the municipalities zoning law or of any ordinance or other regulation made under authority conferred hereby. The language "of any ordinance or other regulation made under authority conferred hereby" refers to the authority granted to municipalities by §17-1-1 *et seq.* of the Mississippi Code Annotated governing zoning, planning and subdivision regulation. Madison has not cited any zoning law or any ordinance or other regulation made under authority of §17-1-1 *et seq.* of the Mississippi Code Annotated which prohibits the use of a retail package store in the location of Vineyard's premises. A retail package store is a lawful use and is regulated by state law, not municipal law.

The cases cited by Madison in support of its position, *Mayor and Board of Aldermen of the City of Pontotoc v. White*, 93 So. 2d 852, 856 (Miss. 1957) and *Delta Const. Co. of Jackson v. City of Pascagoula*, 278 So. 2d 436 (Miss. 1973) are inapplicable to the facts of this case. In both cases cited by Madison, the subject building permits were in violation of existing zoning ordinances. Again, Madison has failed to allege and prove that the application of Vineyard for a building permit was not in compliance with existing building codes and zoning ordinances.

Madison's argument presupposes that the issuance of a building permit for the purpose of making improvements to a building automatically allows the applicant to commence operation of a business in the premises. However, if Vineyard does not commence operation upon the issuance of the building permit, Vineyard is violating no laws and, therefore, the use of the premises to allow construction to improve the premises is not a per se unlawful use of the premises.

Madison goes so far as to state that the cases cited by Vineyard in its brief in support of its position, *Thompson v. Mayfield*, 204 So. 2d 878 (Miss. 1967) and *Berry v. Embry*, 120 So. 2d 165

(Miss. 1960) support Madison's position for the reason that there is no obligation to issue a building permit in violation of city ordinances. However, Madison fails to cite what ordinances of the City of Madison would be violated by the issuance of a building permit to Vineyard. A violation of a city ordinance requires an affirmative act not a proposed use. Unless and until Vineyard sold alcoholic beverages on the premises without a proper ABC Permit, Vineyard is not in violation of any statute, regulation or ordinance. Madison is equating building with selling alcoholic beverages. The proposed use of a premises for a retail package store is a lawful use and Madison can cite no authority on point which requires a applicant for a building permit to have a ABC Permit prior to the issuance of a building permit for a proposed use of a package retail store in a properly zoned area and in conformance with existing building codes.

As set out in the brief of Vineyard, the application for building permit submitted by Vineyard was in compliance with all existing zoning ordinances and building codes of the City of Madison and the denial of the building code was arbitrary and capricious and Vineyard submits that this Court should reverse the denial of the issuance of the building permit and remand this case with an order that the City of Madison issue the building permit to Vineyard.

Madison contends that the decision to deny the building permit to Vineyard was "fairly debatable" and, therefore, this Court is without authority to supplant the municipality's legislative decision citing *Fondren North Renaissance v. Mayor and City Council of City of Jackson*, 749 So. 2d 974 (Miss. 1999). Again, *Fondren* is a zoning case and is inapplicable to the facts of this case. This case does not involve a zoning decision by the City of Madison.

Madison's contention that the use of Vineyard's premises would be unlawful unless an ABC Permit was obtained prior to the issuance of a building permit is neither logical or rational. The

conclusion assumes facts not in evidence that Vineyard would immediately commence selling alcoholic beverages on the premises upon the issuance of a building permit. A criminal act requires affirmative action and a proposed use is not a violation of state law or a criminal offense against the City of Madison.

Vineyard contends the decision of the Madison County Circuit Court which affirmed the City of Madison's denial of the building permit was arbitrary and capricious and should be reversed by this Court. In the case of *Lowe v. Lowndes County Building Inspection Department*, 760 So. 2d 711, (Miss. 2000), the Mississippi Supreme Court defined "arbitrary and capricious" in review of a decision made by an administrative agency on appeal.

"We have stated that arbitrary and capricious is "open-textured and not susceptible of precise definition or mechanical application." (citation omitted) We found North Carolina's definition of the term helpful:

An act is arbitrary when it is done without adequately determining principle, not done according to reason or judgment, but depending upon the will alone, - absolute in power, tyrannical, despotic, non-rational - implying either a lack of understanding of or a disregard for the fundamental nature of things . . . An act is capricious when it is done without reason, in a whimsical manner, implying either a lack of understanding of or disregard for the surrounding facts and settled controlling principles. (citations omitted)

It is clear that the action of the City of Madison in denying the building permit to Vineyard was both arbitrary and capricious. Madison cites no violation of building codes or zoning ordinances applicable to Vineyard's premises and strained reasoning in its argument that the proposed use of a liquor store prior to issuance an ABC Permit constitutes criminal activity justifying the denial of a building permit. It is clear that the City of Madison does not want Vineyard to operate a liquor store at the proposed location based upon the will alone of the Mayor and Board of Aldermen,

absolute in power, tyrannical, despotic, and non-rational. The denial of the building code is clearly capricious as the denial was without reason, was done in a whimsical manner, implying either a lack of understanding of or disregard for the surrounding facts and settled controlling principles. Madison can cite no authority other than strained interpretations of cited cases that are only applicable to zoning issues.

CONCLUSION

For the reasons set forth above and in the Brief of Appellant, Vineyard requests that this Court reverse the decision of the Madison County Circuit Court which affirmed the Mayor and Board of Aldermen of the City of Madison in their denial of the application for a building permit by Appellant, Vineyard Investments, LLC, and remand this case to the City of Madison and order that the City of Madison issue a building permit to Vineyard Investments, LLC.

Respectfully submitted,

VINEYARD INVESTMENTS, LLC

BY:


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CERTIFICATE OF SERVICE

I, William P. Featherston, Jr., do hereby certify that I have this date hand delivered a true and correct copy of the above and foregoing document to:

Honorable John Hedglin
Attorney for the City of Madison
2001 Main Street
Madison, Mississippi 39110

DATED this the 25th day of April, 2008.



WILLIAM P. FEATHERSTON, JR.

AMENDED CERTIFICATE OF SERVICE

I, William P. Featherston, Jr., do hereby certify that I have this date hand delivered a true and correct copy of the Appellant's Brief in Reply to the Brief of Appellee to:

Honorable John Hedglin
Attorney for the City of Madison
2001 Main Street
Madison, Mississippi 39110

Honorable William E. Chapman, III
Madison County Circuit Judge
P. O. Box 1626
Canton, MS 39046

DATED this the 23^d day of April, 2008.



WILLIAM P. FEATHERSTON, JR.