

Richard M. Burts

Petitioner

vs.

The City of Columbia and The Board of Zoning Appeals, John Scarbrough, Jim Poston, and Back Forty Holdings, LLC.

Petitioners(s)

Submitted By: Richard A. Harpootlian

Address: 1410 Laurel Street, Columbia, SC 29201

CIVIL ACTION COVERSHEET

2018CP400-0327

SC Bar #: 2725

Telephone #: (803) 252-4848

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Other:

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NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
- ☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts

- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Fraud/Bad Faith (150)
- ☐ Failure to Deliver/Warranty (160)
- ☐ Employment Discrim (170)
- ☐ Employment (180)
- ☐ Other (199) _____

Torts - Professional Malpractice

- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)
- Previous Notice of Intent Case # 20 ____ -NI- ____ -
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299) _____

Torts - Personal Injury

- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Assault/Battery (370)
- ☐ Slander/Libel (380)
- ☐ Other (399) _____

Real Property

- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499) _____

Inmate Petitions

- ☐ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599) _____

Administrative Law/Relief

- ☐ Reinstate Drv. License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899) _____

Judgments/Settlements

- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Confession of Judgment (770)
- ☐ Petition for Workers Compensation Settlement Approval (780)
- ☐ Other (799) _____

Appeals

- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☒ Zoning Board (970)
- ☐ Public Service Comm. (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999) _____

Special/Complex /Other

- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699) _____
- ☐ Sexual Predator (510)
- ☐ Permanent Restraining Order (680)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Pre-Suit Discovery (670)

Submitting Party Signature: _____

Date: January 17, 2018

Effective January 1, 2016, Alternative Dispute Resolution (ADR) is mandatory in all counties, pursuant to Supreme Court Order dated November 12, 2015.

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

Pursuant to the ADR Rules, you are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs.
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA,)
)
COUNTY OF RICHLAND)
)
Richard M. Burts)
)
Plaintiff,)
)
vs.)
)
The City of Columbia, et al.)
)
Defendant.)

IN THE COURT OF COMMON PLEAS

SUMMONS

FILE NO.

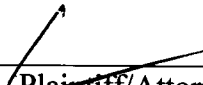
2018 JAN 17 PM 3:28
JEANETTE W. HORN
C.C.P. & G.S.

TO THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

Columbia, South Carolina

Dated: 1/17/18


Plaintiff/Attorney for Plaintiff

Address: Richard A. Harpootlian, P.A.
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facsimile (803) 252-4810
rah@harpootlianlaw.com

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

**IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT**

Richard M. Burts

Petitioner,

v.

The City of Columbia and The Board of
Zoning Appeals, John Scarbrough, Jim
Poston, and Back Forty Holdings, LLC

Respondents.

Civil Action Number: 2018-CP-40-

**APPEAL FROM DECISION OF THE
BOARD OF ZONING APPEALS**

AND

**PETITION FOR
WRIT OF SUPERSEDEAS**

2018 JAN 17 PM 3:28
JENNIFER W. HOBBS
CLERK OF COURT

The Petitioners appeal the decision of the City of Columbia Board of Zoning Appeals (“BoZA”) granting Respondent Jim Poston’s application for a Special Exception to construct a drive thru for a Zaxby’s to be located at 700 Harden Street, the property of the former Harper’s Restaurant in the 5 Points Area. The decision of the BoZA was mailed on January 11, 2018 (**Exhibit A**). Petitioners appeal as follows:

1. The court has jurisdiction and venue is proper pursuant to S.C. Code Ann. § 6-29-820 and the City of Columbia Code of Ordinances § 17-115.

2. Petitioner, Richard M. Burts, is owner of properties 707-711 Saluda Avenue Columbia, SC and an interested party pursuant to South Carolina Code § 6-29-820.

3. Respondent Jim Poston and Back Forty Holdings, LLC are the applicants for the Special Exception, representing Zaxby’s.

4. Respondent, John Scarborough, is the property owner of the “Old Harper’s Building.”

5. The Old Harper’s Building, located on 700 Harden St. (“the Property”), is rectangular in shape and is located at the convergence of three roads and sidewalks: Devine, Harden, and

Santee. The Property has two limited modes of ingress and egress, located on Santee Ave, and Harden St.

6. The City of Columbia Board of Zoning Appeals ("BoZA") is a board duly organized and existing pursuant to South Carolina Code § 6-29-780 and City of Columbia Code of Ordinances §§ 17-111, et seq.

7. On November 14, 2017, Respondent Jim Poston filed an application with the BoZA pursuant to City of Columbia Code of Ordinances § 17-258 and § 17-112 on behalf his company Back Forty Holdings, LLC and as agent for the owner John Scarborough, requesting the BoZA allow a special exception for a drive-through as part of the planned renovation of the Old Harper's into a new Zaxby's Restaurant.

8. BoZA conducted a hearing for the application on December 12, 2017 and decided to grant the special exception by an affirmative vote. The BoZA subsequently issued an Order for a Special Exception on January 11, 2018, granting the application for a drive-thru window. (See **Exhibit B**, Audio Transcription of Board of Zoning Appeals, Dec. 12, 2017)

9. Section 17-112(c) of the zoning ordinance for the City of Columbia sets forth the criteria for a special exception and the specific factual findings required by the BoZA before approving a special exception. The BoZA can approve an application for a special exception only upon a finding that all the criteria under § 17-112(c) are met. The applicable special exception criteria include the following considerations:

- a. Vehicular traffic and vehicular and pedestrian safety;
- b. Environmental factors such as noise, lights, glare, etc.;
- c. Aesthetic character of the area;
- d. Public safety or nuisance conditions detrimental to the public interest, including any possible result in increased law enforcement response;
- e. Concentration or proliferation of similar types of special exception use, including impacts approval of the special exception may have on development or redevelopment of the area;

- f. Consistence with the character and intent of the underlying district, including any overlay district goals and requirements;
- g. Appropriateness of location and compatibility with adjacent properties; and
- h. A finding “the proposed special exception will not adversely affect the public interest.”

A. The application was not supported by competent evidence at the hearing

10. A copy of the audio transcription was reviewed prior to filing this appeal.

11. The transcription shows applicant’s primary testimony was its attorney, Bob Fuller, and Dan Creed, with Heritage Engineering, making statements based on speculation and opinion, without any evidentiary basis to back the conclusory statements made in support of the criteria listed for the special exception.

B. The proposed special exception will create a proliferation of similar establishments and will have a substantial adverse impact on vehicular traffic or vehicular and pedestrian safety (§§ 17-112(c)(1),(5))

12. Applicant did not present testimony of any qualified witness regarding traffic impacts, safety based upon an increase of traffic within the intersection or upon the greater 5-Points area, the likely detriment to adjoining properties based upon increases of traffic, or the effect upon the public interest.

13. Numerous witnesses intimately familiar with the area testified in opposition to the Application citing their first-hand observations of the increase in traffic brought within the 5-Points area by similar establishments that were granted special exceptions for a drive-through in the past.

14. The BoZA determined the special exception will not create a proliferation or concentration of the same or similar types of special exception use because “the site is adaptable to a drive-through without complicating the site.”

15. Currently, Chick-fil-a, Cook-Out, and five banks operate drive-thru’s in the 5-Points neighborhood.

16. The Special Exception, therefore, clearly creates a proliferation of similar types of special exception use and the BoZA's reasoning does not support the determination whatsoever.

17. Witnesses also expressed specific concerns over the situs of Property, particularly how it is situated, with its limited modes of ingress and egress, essentially bottlenecking and blocking traffic in an already congested intersection and vicinity. Specifically,

a. Harden is one of the major arteries of 5 Points, connecting Rosewood and Gervais.

It features a raised island that runs the length of the street, effectively forcing egress from Harpers towards Gervais. The first opportunity to reverse course would require a U-turn on Greene Street., another major intersection connecting 5-Points with the heart of the USC campus.

b. Devine Street also features a raised median towards the intersection, preventing vehicles from crossing over towards Santee and into the Property.

c. Vehicles attempting to enter the Property would be forced to circle around the block (Greene Street to Pavillion Street to Santee Avenue) or be forced to maneuver one or more U-turns on exceptionally busy intersections.

18. The BoZA hearing revealed Zaxby's intent is to draw even more vehicular traffic into the area through implementation of a drive-thru.

19. Witness's presentment of facts concerning the increasingly troublesome traffic patterns present in the area, considered with the concomitant risks such as safety, public interest, and nuisance conditions, raise an evidentiary hurdle that was not factually overcome by any opposing witness testimony.

20. No study of traffic, of any kind, was conducted or offered into evidence to support the *supposition* that the drive-through would not substantially impact vehicular and pedestrian safety or substantially impact vehicular traffic.

21. All discussions of traffic issues were related to on-site vehicle distribution and no analysis or evidence was offered by witnesses concerning the limited modes of ingress and egress onto the property or the detrimental effect vehicles attempting to re-route through the area will cause.

C. The proposed special exception will have a substantial adverse impact on the aesthetic character of the area and is contrary to future five: five points development and design guidelines (§§ 17-112(c)(3), (6)).

22. The property is located in the area designated by the City of Columbia as “Lower Five Points.” It has a distinctive “village” aesthetic with small shops opening to sidewalks. Placement of a chain fast-food franchise with a drive through harms this aesthetic and is directly contrary to numerous Design Principles spelled out in the Future Five: Five Points Development and Design Guidelines (“5-Points Master Plan”), a plan issued by the City Council for the 5-Points area.

23. Witnesses expressed concern during the hearing that approval of the special exception would be in contravention of the 5-Points Master Plan.

24. The BoZA failed to consider the adverse impact upon these design guidelines in assessing the impact upon the applicable criteria under § 17-112, such as whether the special exception is “consistent with the character and intent” of the underlying area.

25. Principle 1.2 of the 5-Points Plan requires reinforcement of the “unique features of the District.” Principle 2.1 states the City should promote pedestrian interaction and principle 2.2 states the City should promote “active street-facing facades.” Further, Principle 2.3 states the City should design for personal safety and security.

26. Despite one or more witnesses issuing concerns regarding the special exception's degradation of these goals, BOZA approved the proposed Zaxby's drive through. Such action violates all of the design principles stated above and is therefore against the public policy and character and intent of the underlying area.

27. Upon information and belief, BoZA also took into account the financial considerations of the property owner, John Scarborough, as an additional factor in assessing whether to grant the special exception. Such consideration is outside the legal criteria delineated under § 17-112(c).

28. The decision of the BoZA to grant the special exception is therefore contrary to law, not supported by competent evidence in the record, arbitrary and capricious, and an abuse of discretion.

PETITION FOR WRIT OF SUPERSEDEAS

29. Petitioners respectfully request the Court issue an immediate Writ of Supersedeas pursuant to South Carolina Code § 6-29-830.

30. An immediate order from this Court is necessary because no automatic statutory stay is implemented when appealing a decision from the Board of Zoning Appeals.

31. Normally, an appeal from the Zoning Administrator to the BoZA "stays all legal proceedings in furtherance of the action appealed from" under South Carolina Code § 6-29-800; however, notice of appeal from the BoZA to the circuit court does not "ipso facto act as a supersedeas, but the judge of the circuit court may in his discretion grant a supersedeas upon such terms and conditions as may seem reasonable and proper." S.C. Code Ann. § 6-29-820 (Supp. 2017).


32. The BoZA's approval of constructing a drive-through window will go into effect immediately, allowing Respondents to proceed with implementation of the special exception.

33. Petitioners request the Court to effectively stay the matter, prohibiting Respondents from moving forward with any construction or implementation process of a drive-through

CONCLUSION

34. For all these reasons, Petitioner prays (1) for an order reversing the decision of the BoZA and directing the BoZA to deny the Application; (2) in the alternative, to remand the case for a full rehearing on the matter with further instructions to the BoZA, including proper consideration of applying an appropriate standard of factual review; (4) a supersedeas pursuant to South Carolina Code § 6-29-830 staying the matter until final review has been made; and (3) for the granting of such other and further relief as appears to the court to be just and proper.

Respectfully submitted by,



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ATTORNEY FOR PETITIONER

January 17, 2018
Columbia, South Carolina.