

IN THE FIFTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

FILED

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RICHARD R. ROOKER, CLERK

[Signature] D.C.

RICHARD A. DEMONBREUN,)

Petitioner,)

vs.)

METROPOLITAN BOARD OF ZONING)
APPEALS OF THE METROPOLITAN)
GOVERNMENT OF NASHVILLE AND)
DAVIDSON COUNTY)

Respondent.)

CASE NO. 08c-3867

2009 MAR -4 PM 12: 26
METRO DEPT. OF LAW

DEPT. OF NASHVILLE
& DAVIDSON CO

ORDER GRANTING WRIT OF CERTIORARI AND THE ISSUANCE OF A SPECIAL EXCEPTION PERMIT WITH LIMITATIONS AND RESTRICTIONS

This cause is before the Court on the Petitioner's Writ of Certiorari requesting relief from the Metropolitan Board of Zoning Appeals' decision entered December 1, 2008 which denied the Petitioner's application for a special exception permit to allow him to host Historic Home events at 746 Benton Avenue, Nashville, Tennessee (Timothy Demonbreun Home). After reviewing all pleadings filed in this case as well as conducting an expedited hearing for the Writ of Certiorari on February 27, 2009, the Court finds that the Writ of Certiorari is well-taken.

A trial court is very limited in its review of a common-law writ of certiorari. See Tenn. Code Ann. § 27-8-101 (2000). A court only reviews the record from a board or agency to determine if that administrative body has: (1) exceeded its jurisdiction; (2) acted illegally, arbitrarily or fraudulently; or (3) acted without material evidence to support the action taken below. *Lafferty v. City of Winchester*, 46 S.W.3d 752, 759 (Tenn. Ct. App. 2000).

"In proceedings involving a common law writ of certiorari, illegal, arbitrary, or fraudulent actions include: 1) the failure to follow the minimum standards of due process; 2) the misrepresentation or misapplication of legal standards; 3) basing a decision on ulterior motives; and 4) violating applicable constitutional standards." *Harding Academy v. Metro. Gov't of*

Nashville and Davidson County, 222 S.W.3d 359, 363 (Tenn. 2007) (citing *Hoover Inc. v. Metro Bd. of Zoning Appeals*, 924 S.W.2d 900, 905 (Tenn. Ct. App. 1996)).

In this case, the Board of Zoning Appeals heard the Petitioner's application for a special exception permit on November 20, 2008. The Board issued an Order on December 1, 2008 denying the application. The Petitioner presented his application showing that he had met the requirements for a special exception permit to allow him to host Historic Home Events at his house located at 746 Benton Avenue, Nashville, TN. Following a hearing on the application, the Board of Zoning Appeals denied the Petitioner's application when five board members voted against the special permit and one board member abstained from voting.

After reviewing the record before it, the Court finds that the Board of Zoning Appeals acted illegally when it denied the Petitioner's application for a special exception permit to host Historic Home Events because the Board's decision was based on ulterior motives.

The following statements by Chairman Ewing and board members Mr. Randels, Mr. Bedne and Ms. Surface from the record of the hearing by the Board on November 20, 2008 are evidence of those ulterior motives. (All of the foregoing statements and comments by board member Ms. Lyford, who abstained from voting, are referenced to put into context the ulterior motives of the four other board members quoted below.):

1. **Lyford:** "I look at his petition [petition containing 111 signatures] and there are a couple of people who have supported it in his petition...that actually rejected it in March and now they are supporting it in November. So I'm curious as to what—it looks like a lot of people do support it." P. 308, Lines 7-12.

2. **Chairman Ewing:** "The last time Mr. Demonbreun came to us, he had old

signatures...from 2006. He has presented 111 signatures.” P. 311, Line 25, P. 312 Lines 1, 3-4.

3. **Chairman:** “Have you changed any?”

Demonbreun: “Absolutely.”

Chairman: “How?”

Demonbreun: “By the way I approach the neighbors, by the way I reach out to them and ask them, ‘What can I do to help you?’ I’ve offered to have the holiday party, and they had accepted that.” P. 334, Line 25, P. 335 Lines 1-6.

4. **Randels:** “I think it’s more than a second chance. I’m having a hard time believing you. I have sat through most the times that you’ve come before this Board, and I’ve sat through the times where we’ve asked the neighbors to report your digression from the rules and regulations that we imposed on you. I’ve sat through and kind of looked from a distance at the appeals where you’ve just disregarded the rules that we’ve imposed on you in the past—” P. 337, Lines 15-22.

5. **Randels:** “I’m just wrestling with the lack of respect that you show this Board when you know that we have imposed restrictions on you of the number of events, and you come in here and the application to us says, ‘I want six events a week.’ I don’t have—”

...

Demonbreun: “I only followed what Ms. Coleman [previous permit holder] had been provided, sir. I didn’t want to disrespect the Board. And if less events each week is

appropriate, I will be glad to accept whatever the Board gives me.” P. 339, Line 25, P. 340 Lines 1-4, 10-14.

6. **Bedne:** “...So, I mean, I don’t even have to talk to the neighbors. I can just listen to that before the Board, and here are all these records. I understand that you feel very emotional about it. I respect that. I wish you well. But we just need to look at the record. That’s the point here. And so promises, you know—”

Demonbreun: “I’m not promising you, sir. I’m looking at the signatures of the vast majority of these neighbors support my application.”

Bedne: “Listen to me. A minute ago he [Chairman Ewing] asked you to tell us how can you prove to us that there has been a change, and I don’t see proof. I mean, you need to prove it with some concrete—I mean, somebody else that can speak about some dramatic change that can be observed.” P. 345, Lines 11-24.

7. **Chairman:** “But, Mr. Demonbreun, what’s the bottom line of why this Board should give you another chance?”

Demonbreun: “Because I believe the proof submitted today [Petition containing 111 signatures], sir, overwhelmingly establishes that the neighborhood has not been disturbed by my events, that the petition—I have never gone around door to door personally, as I have now, and asked people if they support me—and my name is in that petition, ask them if they support me and the Demonbreun House to be able to host events with these limitations and restrictions, which are significant, and they were all delighted to sign.”

...

Chairman: “I’ll ask you one more time. Have you changed?”

Demonbreun: “I believe I have, sir, and I believe the petition—”

Chairman: “How so?” P. 347, Lines 14-25, P. 348, Lines 15-19

8. **Chairman:** “But what we’re saying, this isn’t anything new. How have you changed?” P. 349, Line 16-17

9. **Surface:** “Well, if the neighbors are supporting you, why isn’t there a neighbor here speaking on your behalf?” P. 351, Lines 8-10.

10. **Bedne:** “I’m not saying that we expect that. We’re just wondering, because you keep on talking about how much support you have—”

Demonbreun: “Yes.”

Bedne: “—but then we don’t see it translating to the type of support—the intensity with which you describe their support is not translating to them being here today.” P. 352, Lines 5-12.

11. **Lyford:** “Well, I would support granting the permit with some conditions. But if nobody else supports that, I don’t even need to discuss it. So I gather that—”

Chairman: “Based on what? I’m not sure.”

Lyford: “What’s my reasoning?”

Chairman: “Uh-huh.”

Lyford: “Because I think that—I know that some of the people (inaudible) his petition [containing 111 signatures], and they would not be intimidated. There’s a doctor in there that I know would not be intimidated. But there’s a large number of people to sign it.” P.

353, Lines 16-25, p. 354 1-3.

12. **Surface:** “I’m just saying, that I have heard explanations for everything.”

Lyford: “They [the Petitioner’s explanations] could be valid.” P. 355 Lines 3-5.

13. **Surface:** “I’m going to tell you this, Rebecca [Ms. Lyford], there have been many, many times over this time that I have felt like there are no good guys, they’re all bad guys. Everybody’s bad, everybody misbehaves, everybody is petty, and have misrepresented this or that. I mean, I have felt that way over this case, so I’ll grant you that.” P. 355, Lines 23-25, p. 356, Lines 1-3.

14. **Chairman:** “Anyone for a motion?”

Randels: “Well, I’m going to make a motion for denial. I think we shouldn’t have had to hear this personally, and I think it’s one that’s continuously brought before us. And we’ve thought about it and heard about it, and we hear the same things all the time. And it’s just kind of a repeat what we’ve heard before. I’m going to make a motion for denial.” P. 360, Lines 7-14.

The Court also points to the following statement by board member Ms. Surface at a previous board hearing which is included in the record before this Court:

Surface: “So ah, I just need some more convincing, I guess from you. And I, I ah, wouldn’t mind hearing why you appealed the case before, what drove you to that, after you specifically told us you weren’t going to do that....You took it above us. I have no trust that you won’t do that again.” P. 117, Lines 5-16.

The Court finds that the foregoing statements show that Chairman Ewing, Mr. Randels, Mr. Bedne and Ms. Surface had ulterior motives for denying Mr. Demonbreun's permit application. Those four board members' ulterior motives stem from the fact that the Petitioner has appealed their decisions in the past and that Mr. Demonbreun has frequently appeared before the Board regarding a special exception permit. Those board members allegedly denied the Petitioner's application in this case because of some minor, past violations, but the real motive for the Board's ultimate decision in this case is their clear dislike of the Petitioner as evidenced by the above referenced statements, comments and questions by four of the board members.

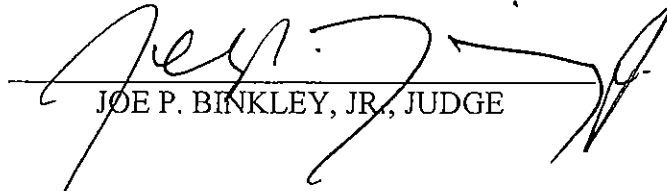
"The common-law writ of certiorari is a supervisory writ, that provides the courts with limited options for dealing with error discovered in the proceedings being reviewed. Because courts should avoid requiring local zoning authorities to take a particular action *except in the most extraordinary circumstances*, the most common judicial remedy in zoning cases is to remand the case to the zoning agency with instructions appropriate to the circumstances of the case." *Hoover v. Metro. Bd. of Zoning Appeals for Davidson County, Tennessee*, 955 S.W.2d 52, 55 (Tenn. Ct. App. 1997) (citation omitted) (emphasis added). The Court finds that this case presents one of the above referenced extraordinary circumstances. Because of the obvious biases which members of the Board of Zoning Appeals have against this Petitioner, if this case is simply remanded with appropriate instructions, this Petitioner's application for a special exception permit to host Historic Home Events, will not be entertained by the Board anytime in the near future.

This Court, therefore, finds that this case fits the definition of "most extraordinary circumstances" and the Court further finds that it is necessary to remand this matter to the Board of Zoning Appeals and for the Board to take the following action:

- (1) The Petitioner, Richard A. Demonbreun shall be granted a Special Exception Permit for the use of his property located at 746 Benton Avenue, Nashville, Tennessee, as a “Historic Home Event” site pursuant to Metropolitan Zoning Ordinance, Section 17.16.160(B).
- (2) The Permit shall contain the following limitations and restrictions:
 - a. Permit for applicant only to expire in eighteen months subject to renewal;
 - b. All events must be held inside, no outside amplified music, guests may use front/side front porches and side patio behind rear privacy fence;
 - c. Only one event to occur each day, no events on Sunday;
 - d. Weekday events on Monday through Thursday to end no later than 9:30 p.m.; Friday/Saturday events to end no later than 10:30 p.m.; valet services must be completed no later than 30 minutes of event conclusion;
 - e. Any event held on New Year’s Eve may end as late as midnight with all cleanup and valet services being completed no later than 12:30 a.m. on January 1.
 - f. Only two large events each week over 40 guests, none larger than 75 guests;
 - g. Valet parking services required for events of more than 15 cars, and additional cars must be valet parked in rented lots off site on 8th Avenue;
 - h. No tents, large tour buses or horse carriages permitted;
 - i. No adjacent property may be used for any event;
 - j. At least one week advanced public notice of all scheduled events including customer’s name, phone number, date, time, size and description to be posted on “District 17: and “Woodland-in-Waverly” Google Groups web page for independent verification.

It is so **ORDERED**.

Entered this _____ day of _____, 2009.



JOE P. BINKLEY, JR., JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Order has been mailed to Richard A. Demonbreun, Esq., 746 Benton Ave., Nashville, TN 37204; Elizabeth A. Sanders, Esq., Metropolitan Courthouse, Suite 108, Nashville, TN 37219-6300 this 3rd day of March, 2009.



Deputy clerk