F

IN THE SUPERIOR COURT OF FULTON COUNTY
ATLANTA JUDICIAL CIRCUIT
STATE OF GEORGIA

AIKG, LLC, Petitioner, v. CITY OF ROSWELL, GEORGIA; JERE WOOD; RICH DIPPOLITO; BECKY WYNN; BETTY PRICE; KENT IGLEHEART; JERRY ORLANS; and NANCY DIAMOND, individually and in their official capacities as Mayor and Members of the City Council of the City of Roswell, Georgia, Respondents,	CIVIL ACTION FILE NO. 2011CV195265 JUDGE BRASHER

ORDER

The above-styled case comes before the Court as an appeal from the denial of a conditional use and concurrent variance permit by the City of Roswell to AIKG, LLC, d/b/a Andretti Indoor Karting and Games ("Andretti"). Upon consideration of the record, the certified zoning ordinances, and the arguments of the parties, the Court AFFIRMS the denial as set out herein.

Andretti operates an arcade and go-kart establishment in Roswell. Andretti wished to expand its business, and so developed a plan to install an outdoor go-kart track on its south-side parking lot.

Andretti applied to the City for a conditional use and concurrent variance so that it could construct the outdoor go-kart track. In support of its application, Andretti conducted two noise ordinance studies, met with the various neighborhood groups, met with the Roswell

Planning Commission, and worked with the Roswell Design Review Board. In the end, Andretti came to the hearing before the Board with a recommendation of approval. Nevertheless, the Board unanimously denied Andretti's application.

Andretti timely filed this case seeking a writ of mandamus, declaratory judgment, alleging a lack of procedural due process, and claiming a violation of equal protection. The Court will address each in turn.

Mandamus

Mandamus is a proper remedy for mandatory acts and is not available to remedy discretionary acts absent a gross abuse of discretion. OCGA § 9-6-20; *Vargas v. Morris*, 266 Ga. 141, 465 SE2d 275 (1996).

> Mandamus will issue against a public officer under two circumstances: (1) where there is a clear legal right to the relief sought, and (2) where there has been a gross abuse of discretion. Where the zoning ordinance does not prescribe all the conditions which must be met in order to obtain a conditional or special use permit but leaves the issuance thereof to the discretion of the issuing authority, then the aggrieved applicant may proceed by mandamus where no adequate remedy is provided, but must show that denial of such permit constituted a gross abuse of discretion by the governing authority. Or as was said in *Pruitt v. Meeks,* 226 Ga. 661, 662, 177 SE2d 41 (1970), the applicant must show that the discretionary denial of the permit was arbitrary, capricious and unreasonable.

(Punctuation omitted.) *Dougherty County v. Webb,* 256 Ga. 474, 475-76, 350 SE2d 457 (1986).

The standard of review for this Court is any evidence. *Id.*

> By focusing on whether the decision is supported by any evidence, we recognize that zoning is a legislative and not a judicial function. ...
>
> Whether denominated as special approval, special exception, special permit or conditional use, this zoning technique was developed as a means of providing for types of land use which are necessary and desirable, but which are potentially incompatible with uses usually allowed in the particular district. All involve a special use authorized by the existing zoning ordinance, but the

> ordinance provides that such uses shall be allowed only upon the condition that it be approved by the appropriate governmental body. This zoning device allows the local governing body to anticipate proposed future land uses potentially in conflict with existing permitted uses, and affords the flexibility of permitting the proposed use upon compliance with conditions set out in the ordinance, or in the discretion of the local governing body.

(Citations and punctuation omitted.) *City of Roswell v. Fellowship Christian Sch., Inc.*, 281 Ga. 767, 768, 642 SE2d 824 (2007).

The properties surrounding Andretti are:

North: shopping center

South: car dealership

West: bike shop and auto repair center

East: beverage warehouse and car shop; residential; and cemetery

The noise studies conducted by Andretti showed no effect on the residential area on the East side. It was clear though, and Andretti conceded, that the surrounding businesses would be affected by the noise.

The Board also received testimony that local residential sales had already been affected by the proposal, and that local property values would decline in the future if the track were permitted. The Board also heard from neighbors concerned about the lighting for the track, as well as about the appearance of a proposed tent which Andretti intended as a cover for the carts and the patrons.

The Board expressed concerned that even if noise from the outdoor track did not reach the residential properties, the surrounding business properties would be affected. The Board was further concerned about its own internal consistency, both with its past rulings and with its future rulings. Specifically, a nearby property had been prohibited in the past from installing outdoor speakers because of the Board's concern about the affect such speakers would have on the

property's neighbors. The Board desired to act consistently with that ruling. In the end, the Board decided that Andretti's permit would not be in the City's best interests.

Andretti argues that the City's ruling was arbitrary and capricious.

As pointed out by Andretti, Roswell's ordinance 31.1.19 requires that, in rendering a decision on an application, the Mayor and Board consider "all information supplied by the zoning director, the design review board if applicable, ... the planning commission, and any information presented at its public hearing." The Mayor and Board may also consider the following criteria, found in table 31.1.4:

> 1. Whether the proposal will permit a use that is suitable in view of the use and development of adjacent and nearby property.
>
> 2. Whether the proposal will adversely affect the existing use or usability of adjacent or nearby property.
>
> 3. Whether the property to be affected by the proposal has a reasonable economic use as currently zoned.
>
> 4. Whether the proposal will result in a use which will or could cause an excessive or burdensome use of existing streets, transportation facilities, utilities, or schools.
>
> 5. Whether the proposal is in conformity with the policy and intent of the comprehensive plan including land use element.
>
> 6. Whether there are other existing or changing conditions affecting the use and development of the property which give supporting grounds for either approval or disapproval of the proposal.
>
> 7. Existing use(s) and zoning of subject property.
>
> 8. Existing uses and zoning of nearby property.
>
> ...
>
> 18. Possible effects of the change in zoning or overlay district map, or change in use, on the character of a zoning district or overlay district.

19. Whether a proposed zoning map amendment or conditional use approval will be a deterrent to the value or improvement of development of adjacent property in accordance with existing regulations.

20. The possible impact on the environment, including but not limited to, drainage, soil erosion and sedimentation, flooding, air quality and water quality.

21. The relation that the proposed map amendment or conditional use bears to the purpose of the overall zoning scheme, with due consideration given to whether or not the proposed change will help carry out the purposes of these zoning regulations.

22. The consideration of the preservation of the integrity of residential neighborhoods shall be considered to carry great weight. In those instances in which property fronts on a major thoroughfare and also adjoins an established residential neighborhood, the factor of preservation of the residential area shall be considered to carry great weight.

The ultimate decision is left to the Mayor and Board.

Evidence exists in the record to show that all of the required information was considered. Several of the criteria from the table at 31.1.4 were specifically mentioned at the hearing. There exists no basis to believe that the City's decision was arbitrary or capricious. The request for mandamus is DENIED.

Declaratory Judgment

Declaratory judgment actions are also permitted to challenge certain BZA actions, but only if the decision by the Board is unclear. *See, Head v. DeKalb County,* 246 Ga. App. 756, 760, 542 SE2d 176 (2000).

To be entitled to declaratory judgment, "a plaintiff must demonstrate facts or circumstances whereby [it] is in a position of uncertainty or insecurity because of a dispute and of having to take some future action which is properly incident to its alleged right, and which future action without direction from the court might reasonably jeopardize [its] interest."

Patterson v. State, 242 Ga. App. 131, 132, 528 SE2d 884 (2000). Since Andretti is not unsure of its rights, it is not entitled to declaratory judgment.

The cases relied on by Andretti do not bolster its position. *Jackson County v. Earth Res., Inc.,* 280 Ga. 389, 627 SE2d 569 (2006), is a mandamus case, not a declaratory judgment case. *Guntharp v. Cobb County, Ga.,* 168 Ga. App. 33, 35, 307 SE2d 925 (1983), which Andretti relies on for the "substantial evidence" standard, is a case that arises from certiorari, not mandamus. Furthermore, *City of Atlanta Gov't v. Smith* has made clear that "the appropriate standard of review to be applied to issues of fact on writ of certiorari to the superior court is whether the decision below was supported by any evidence," not substantial evidence. 228 Ga. App. 864, 865, 493 SE2d 51 (1997).

In substance it appears that Andretti is arguing that the City's denial was unsupported by any evidence. Andretti contends that the City based its decision solely on vague fears from the neighbors.

The Court disagrees. In *Earth Res, supra,* the Court of Appeals upheld the denial of a conditional use permit for a construction and demolition landfill.

> Earth Resources urges that the only facts presented in opposition to its application were "generalized fears" concerning landfills, insufficient to rebut the evidence it presented in support of its application. ... But, the facts placed before the Board when it made its final decision represented more than merely "generalized fears"; very specific concerns were raised as to truck traffic and other issues.

(Citation omitted.) 280 Ga. at 391. Here, though Andretti's presentation was more formal, and contained a sound study, the testimony from the neighbors was no less admissible or relevant for the Board's consideration.

The Court finds that the Board's ruling was supported by evidence. The request for declaratory judgment is DENIED.

Procedural Due Process and Equal Protection

"Procedural due process means notice and an opportunity for affected parties to be heard. The purpose of the hearing is to permit interested persons to furnish information that will assist the board in deciding whether a variance should be granted." (Citations omitted.) *Jackson v. Spalding County*, 265 Ga. 792, 794, 462 SE2d 361 (1995). Whether the City has made available adequate procedures to protect due process is a question of law, but whether the City has actually followed its own procedures is a question of fact. *Dover Realty Co v. City of Jackson*, 246 Ga. App. 524, 541 SE2d 92 (2000).

"Zoning ordinances must be enforced in a reasonable and nondiscriminatory manner in order to satisfy equal protection requirements, and whether they are so uniformly enforced is a question of fact." *Gouge v. City of Snellville,* 249 Ga. 91, 94, 287 SE2d 539 (1982). "[S]ome selectivity of enforcement is constitutionally permissible." *Id.*

Andretti alleges that it was not permitted equal time at the hearing. Specifically, Andretti claims that Ordinance 31.1.24 allowed it and its opponents 10 minutes each to speak, but that its opponents spoke for over two hours.

Ordinance 31.1.24(4), (5), and (6) govern the timing of presentations of applications before the Board.

> (4) ... There shall be a minimum time period of ten (10) minutes per application at the public hearing for the proponents to present data, evidence, and pinions; the city shall not be obligated to provide the full ten-minute period to the proponents if they elect not to use that much time. ...
>
> (5) ... There shall be a minimum time period of ten (10) minutes per application at the public hearing for the opponents to present data, evidence, and opinions; the city shall not be obligated to provide the full ten-minute period to the opponents if they elect not to use that much time. ...

> (6) At the conclusion of public testimony, or upon the expiration of time allotted for public testimony, the applicant or his or her agent, or both, shall be allowed a short opportunity for rebuttal and final comment, and the time devoted to any rebuttal shall be counted toward the total ten (10) minutes allotted to the applicant under paragraph 4 above.

The ordinance does not provide for a maximum time period. Rather, it provides for a minimum time period. Nothing in the ordinance requires that equal time be given to both the proponent and the opponent of an application.

Pursuant to the due process clauses of the State and US Constitutions, "the state must give notice and an opportunity to be heard to a person deprived of a property interest." *Camden County v. Haddock,* 271 Ga. 664, 665, 523 SE2d 291 (1999). The "focus of the procedural due process analysis is whether the state makes adequate procedures available," not whether the applicant achieves a successful outcome. *Id.* "The goal is a fair hearing." *Jackson,* 265 Ga. at 795.

The Court finds the procedures made available by the City to be sufficient to satisfy due process. Each side was given an opportunity to present its case, and to present the evidence in support thereof. The procedural due process claim is thus DENIED.

Likewise, Andretti has presented no evidence to show that the City enforced its zoning ordinance against it in a discriminatory manner. *Gauge, supra.* In fact, the record reveals the City's concern that it enforce its ordinances in a manner consistent with historic precedent, uniformly to all applicants. The Court therefore DENIES the equal protection claim.

This 4th day of October, 2011.

The Honorable Christopher S. Brasher
Fulton County Superior Court
Atlanta Judicial Circuit

cc:
Robert J. Hulsey, Esq.
City of Roswell
VIA EMAIL rhulsey@ci.roswell.ga.us

Wendy S. Butler, Esq.
Coleman Talley, LLP
VIA EMAIL wendy.butler@colemantalley.com

Tim M. Tanner, Esq.
Coleman Talley, LLP
VIA EMAIL tim.tanner@colemantalley.com