Handelsman v. Town of Palm Beach
Fla.App. 4 Dist.,1991.

District Court of Appeal of Florida,Fourth District.
Burton HANDELSMAN, individually and as General Partner of Worth Arcade Associates Limited Partnership, a Connecticut Limited Partnership, Appellants,
v.
TOWN OF PALM BEACH, a Municipality, Hermine Wiener, Nancy Douthit, Paul Ilyinsky, William Weinberg, and Bernard Heeke, Appellees.
No. 90-0122.

Sept. 4, 1991.
Rehearing Denied Oct. 16, 1991.

Lessor of commercial space sought judicial review of town's denial of special zoning exception. The Circuit Court, Palm Beach County, Mary E. Lupo, J., held for town, and appeal was taken. The District Court of Appeal, Stone, J., held that denial of request for special exception, in order to lease space, formerly used by restaurant as prior nonconforming use, to apparel store, did not deprive lessor of property without due process or equal protection.

Affirmed.

Anstead, J., concurred specially and filed opinion.

Michael B. Davis of Davis Carroll Colbath & Isaacs, P.A., West Palm Beach, for appellants.
John A. DeVault, III and Thomas M. Beverly of Bedell, Dittmar, DeVault & Pillans, P.A., Jacksonville, and John C. Randolph of Jones, Foster, Johnston & Stubbs, P.A., West Palm Beach, for appellee-Town of Palm Beach.
STONE, Judge.

Handelsman, the owner of a building on Worth Avenue in the Town of Palm Beach, appeals a final judgment for the town following a lengthy non-jury trial. The trial court rendered an extensive judgment resolving both factual and legal issues. We affirm.

Handelsman entered into an agreement to lease over 7,000 square feet of space to The Limited stores for a retail store. He had previously leased the space to a restaurant. The restaurant was in operation before certain code changes where enacted, and did not conform to the new code.

The property is in the town's C-WA Worth Avenue Zoning District. The code limits gross leasable area in the district to 2,000 square feet for an apparel store, unless a special exception is granted. The lease was conditioned upon Handelsman's obtaining a special exception. The town

council denied Handelsman's application.

The “Schedule of Use Regulations” for the district contains a footnote which provides that

(1) Regulation of existing nonconforming commercial uses: Any existing uses contained on the list of permitted uses shown herein which contain more than two thousand (2,000) square feet of gross leasable area (GLA) shall be classified as existing nonconforming uses (refer to Section 8.10, “Nonconforming Uses”). However, all future changes of use shall be limited to those uses listed as permitted uses on the list contained herein with a maximum GLA of two thousand (2,000) square feet; and, if a change of use is contemplated from one general commercial category ... wherein the new use will involve a GLA exceeding two thousand (2,000) square feet, then the contemplated new use shall be subject to prior approval of a special exception application by the town council before said change is made (refer to Section 6.40, “Special Exception Uses”).

In effect, the above note will allow any existing use over two thousand (2,000) square feet, in a district with a two thousand (2,000) square footage limitation, to continue operating at its existing scale, or to change to another use within the same general commercial category without council approval.

There was evidence that the “grandfather” provision does not apply to the proposed change in use from the restaurant (a nonconforming use operating without a special exception) to an apparel store (a different commercial category) where the leased area exceeds the space requirements for a permitted use, absent town council approval for a special exception. The restaurant could have converted to a lounge of the same size because they are both within the same commercial category, or to an apparel store of 2,000 square feet or less because that use is permitted under the code. However, there was expert testimony that the restaurant could not be converted*1049 to an apparel store of the same size without town council approval.

The ordinance further provides that it is intended that the district:

preserve and enhance an area of unique quality and character oriented to pedestrian comparison shopping and providing a wide range of retail and service establishments, to be developed whether as a unit or as individual parcels, serving the short-term and long-term needs of townpersons. Further, it shall be the intent of this district to enhance the town-serving character of the area through use of limitations on maximum gross leasable area (GLA) thereby reducing the problems of parking and traffic congestion determined to result from establishments of a region-serving scale.

Additionally, section 8.10 of the code states:... It is the intent of this chapter [ordinance] to permit these nonconforming uses to continue until they are voluntarily removed, removed by abandonment, or otherwise removed as required by this chapter [ordinance], but not to encourage their survival.

It is further the intent of this chapter [ordinance] that nonconforming use shall not be enlarged upon, expanded, intensified or extended, nor be used as grounds for adding other uses prohibited elsewhere in the same district.

In denying the special exception, the town rejected Handelsman's contention that the proposed retail store would primarily serve "town persons." The code requires that applicants for a special exception use which exceeds district space limits must satisfy the council that not less than 50% of the anticipated customers will be "town persons." [FN1] Additionally, the applicant must demonstrate that the principal portion of anticipated customers will not be attracted from off-island locations. These requirements reflect the town's traffic and parking concerns and are to limit displacement of businesses serving the Worth Avenue neighborhood by larger, region-serving establishments.

> FN1. "Town persons" is defined as full time or seasonal residents, and visitors staying in accomodations and employees working in town.

The trial court held that Handelsman had no right to a permit under the zoning code other than by seeking a special exception, that the provisions of the ordinances in question were constitutional on their face and as applied, and that the town's denial of Handelsman's application was not arbitrary and capricious and did not violate Handelsman's civil rights as a "taking" without due process.

Without addressing all of the issues and arguments raised, we conclude, first, that the trial court's interpretation of the "Schedule of Use Regulations," including the footnote, is consistent with the evidence, the plain wording of the ordinance, and the overall purpose of the ordinance. Next, that the trial court did not err, or abuse its discretion, by concluding that the requirement for obtaining a special exception here is consistent with the overall scheme of the ordinances. Additionally, the trial court did not err by rejecting the various constitutional issues raised.

Handelsman has not demonstrated that he was deprived of property without due process or equal protection of law. He retains the ability to use it in conformity with otherwise permitted use and square footage requirements. Nor has Handelsman shown that the Palm Beach Code was arbitrarily applied, despite comparisons with previous town council approval of special exception applications. The trial court could reasonably conclude, among other findings, that Handelsman did not meet the code's requirements, there was a rational relationship between the code provisions in question and the valid public purposes they were designed to further, and the town's conduct was not arbitrary and capricious.

WARNER, J., concurs.

ANSTEAD, J., concurs specially with opinion.*1050 ANSTEAD, Judge, concurring specially.

On appeal our review is limited to three issues which the majority has held, and I agree, do not present reversible error. I agree with the majority that the appellant has failed to demonstrate error in the trial court's interpretation of the ordinance in question, or in rejecting appellant's claims under section 1983 of the Federal Code or the 14th Amendment of the United States Constitution. However, I believe the appellants have made out a good case for demonstrating that the appellee town did not properly apply the special exception provisions of its zoning code when it denied appellant a special exception.

In 1988, appellant sought a special exception to a zoning code provision limiting retail clothing shops to 2,000 square feet. To use more space, the special exception criteria required merchants to demonstrate by "evidence satisfactory to the Town council" that its shop would draw most of its customers from the town of Palm Beach. The appellant placed substantial evidence before the commission to satisfy this requirement. Nevertheless, the council denied the request for a variance. From the record made in this case, it appears to me that the appellant was entitled to the variance. *See Irvine v. Duval County Planning Commission,* 495 So.2d 167 (Fla.1986); *Rural New Town, Inc. v. Palm Beach County,* 315 So.2d 478 (Fla. 4th DCA 1975). In addition, to demonstrate the arbitrary manner in which the council had applied the special exception, the appellant presented proof that exceptions had previously been granted to two other retailers under circumstances I find legally indistinguishable from those involved herein.

The reason that I join in the affirmance is because of the posture of the case before us. Instead of challenging the town's action by appellate review in court, the appellant terminated a lease with a retailer that was conditioned upon the grant of the special exception. This mooted the issue to a great extent, and, as noted, no court review was sought. Instead, appellant filed this action seeking damages and other relief. Not every denial of a special exception, even if incorrect, constitutes a 14th Amendment violation or a basis for a section 1983 action.

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