

JUL 22 2008

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9
10 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
11 **IN AND FOR THE COUNTY OF PINAL**

12 DALE BELL,

13 Plaintiff,

14 vs.

15 PINAL COUNTY BOARD OF)
16 SUPERVISORS; LIONEL D. RUIZ;)
17 SANDIE SMITH; and DAVID SNIDER;)
18 all in their official capacities,)

19 Defendants.)
20)

No. CV 2007-01179

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND FINAL JUDGMENT**

21 **INTRODUCTION**

22 THIS MATTER came before the Court on Plaintiff Dale Bell's administrative
23 appeal. The parties exchanged briefs, and this Court heard oral argument on April 30,
24 2008. After considering the arguments, legal briefs, and exhibits the parties have
25 submitted, as well as this Court's own review of the prior administrative record, the
26 Court finds and concludes as follows:
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1 included an unmarked but clearly designated space for the stage at his restaurant, San
2 Tan Flat. *See* 2003 Site Plan (attached as Exhibit 5, page 2, to the January 2007 Hearing
3 Transcript). The Pinal County Planning and Zoning Commission approved Mr. Bell's
4 zoning change application on April 17, 2003, and the Board of Supervisors likewise
5 voted approval of his application. *See* Planning & Zoning Commission Minutes for
6 April 17, 2003, at 5-8 (attached as Exhibit 1 to the January 2007 Hearing Transcript);
7 Board of Supervisors Minutes for June 4, 2003, at 4-5 *available at*:
8 [http://pinalcountyz.gov/Departments/BoardofSupervisors/Lists/Minutes/Attachments/1](http://pinalcountyz.gov/Departments/BoardofSupervisors/Lists/Minutes/Attachments/171/Minutes.pdf)
9 [71/Minutes.pdf](http://pinalcountyz.gov/Departments/BoardofSupervisors/Lists/Minutes/Attachments/171/Minutes.pdf).

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13 5. Mr. Bell's CB2 zoning restricts his use of the property to those uses permitted in
14 Pinal County Zoning Ordinance section 1601. Pursuant to section 1601(b), Mr. Bell is
15 entitled to operate, among other things, "Amusement or recreational enterprises (within
16 a completely enclosed structure)," which includes a "dance hall"; a "Bar, cocktail
17 lounge, night club, tavern"; and anything in a more restrictive zoning classification,
18 including but not limited to a "Restaurant."

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20 6. There is no provision in the Pinal County Zoning Ordinance that prohibits open-
21 air restaurants from providing live, outdoor, amplified music.

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23 7. Mr. Bell's original Site Plan shows San Tan Flat's outdoor courtyard, and its
24 stage, facing south, which is toward the residential area. *See* San Tan Flat 2003 Site
25 Plan. Responding to concerns regarding potential noise, Mr. Bell changed the
26 orientation of San Tan Flat's outdoor courtyard area so that the stage would instead face
27 north, toward Hunt Highway; that re-orientation appears with the marked designation of
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1 the stage on Mr. Bell's site plan provided to the County in 2004. *See* 2004 Site Plan
2 (attached as Exhibit O to the January 2007 Hearing Transcript); *see also* Jan. 10
3 Transcript at 92, lines 4-9 (testimony of Dale Bell).
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5 8. Pinal County knew that there was going to be a stage at San Tan Flat. The stage
6 appeared on both the initial 2003 Site Plan and the later approved 2004 Site Plan.
7 Transcript of April 30 Hearing at 52:21-24, 57:21-22.
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9 9. The re-orientation of San Tan Flat toward Hunt Highway appearing on the
10 approved 2004 Site Plan indicates that the County knew the stage would generate sound.
11 Tr. at 52:24-53:3, 57:22-24.
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13 10. Mr. Bell submitted an application requesting the Pinal County Board of
14 Supervisors recommend approval of his purchase of a Series 6 Liquor License. *See*
15 Liquor License Application and Approval documentation (attached as Exhibit 4 to the
16 January 2007 Hearing Transcript). The Board unanimously recommended approval of
17 Mr. Bell's Series 6 Liquor License. *See* Board of Supervisors Minutes for November
18 24, 2004, at 2 *available at*:
19 [http://pinalcountyyaz.gov/Departments/BoardofSupervisors/Lists/Minutes/Attachments/1](http://pinalcountyyaz.gov/Departments/BoardofSupervisors/Lists/Minutes/Attachments/16/Minutes.pdf)
20 [16/Minutes.pdf](http://pinalcountyyaz.gov/Departments/BoardofSupervisors/Lists/Minutes/Attachments/16/Minutes.pdf)).
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23 11. A Series 6 Liquor License is a bar liquor license, and there are no restrictions as
24 between the percentage of sales attributable to food and to alcoholic beverages with a
25 Series 6 license. In contrast, a Series 12 Liquor License is a restaurant liquor license,
26 which requires that at least 40% of total sales be attributable to food. *See* A.R.S. § 4-
27 205.02(G)(2). In recommending approval of Mr. Bell's Series 6 Liquor License, the
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1 Pinal County Board of Supervisors did not require—or even discuss whether to
2 require—that he instead pursue a Series 12 Restaurant Liquor License. *See* Board of
3 Supervisors Minutes for November 24, 2004, *infra*.

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5 12. Because the Board recommended approval of Mr. Bell’s Series 6 liquor license
6 and Section 1601(b) lists a bar, cocktail lounge, nightclub or tavern as a permitted use on
7 his property (regardless whether enclosed), Pinal County anticipated that Mr. Bell could
8 sell alcohol at San Tan Flat. Tr. at 53:3-6, 57:24-58:1. Pinal County further anticipated
9 that Mr. Bell’s food sales would not have to meet any minimum percentage of his total
10 sales, although his actual sales figures demonstrate Mr. Bell is operating consistent with
11 the Series 12 Restaurant Liquor License. *Id.*, *see* PMIX Report (attached as Exhibit D to
12 the January 2007 Hearing Transcript).

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15 13. Dale Bell properly proceeded under Pinal County’s planning and zoning
16 requirements, and the Pinal County Board of Supervisors approved Mr. Bell’s
17 applications at each step of the processes related to the zoning and use of the property on
18 which San Tan Flat sits. Tr. at 58:1-2, 8-10.

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20 14. Mr. Bell purchases food products for San Tan Flat from Shamrock Foods, and is
21 in the top 4% of all customers that purchase from Shamrock. *See* Letter from Fred
22 Laskowski to Dale Bell (attached as Exhibit E to the January 2007 Hearing Transcript).
23 The San Tan Flat regular menu is available from 11am until 10pm during the week, and
24 until 11pm on Friday and Saturday nights. *See* Jan. 10 Transcript at 161, line 21 – 162,
25 line 2 (testimony of Dale Bell). The restaurant remains open, offering beverages and a
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1 limited food menu until 12am during the week, and until 2am on Friday and Saturday
2 nights. See Jan. 10 Transcript at 162, lines 2-4 (testimony of Dale Bell).

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4 15. Throughout the week, San Tan Flat provides amplified pre-recorded music in
5 the restaurant's outdoor courtyard. On Wednesdays, Thursdays, and Sundays, from
6 5:30pm until 8:30pm, a one-man band plays live, amplified music in the courtyard for
7 three hours. See Jan. 16 Transcript at 15, lines 1-23 (testimony of Lee Alexander
8 Morris).¹ On Friday and Saturday nights from 9pm until 12am a four-piece dance band
9 plays live, amplified music in the courtyard. See Jan. 10 Transcript at 134, lines 19-22
10 (2007; testimony of Dale Bell). There is no fee or charge associated with the music.
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12 See Jan. 10 Transcript at 127, lines 15-19 (testimony of Dale Bell).

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14 16. Some San Tan Flat patrons choose to dance—most often during the live music
15 in the early and late evenings. See Jan. 10 Transcript at 135, lines 3-12 (testimony of
16 Dale Bell). Mr. Bell and the management staff at San Tan Flat do not monitor or
17 regulate the patrons' dancing, and do not care whether patrons choose to dance. Id.

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19 17. Mr. Bell does not derive any revenue from the music or his patrons' dancing.

20 18. While some neighbors have complained about the noise, lights, and signage at
21 San Tan Flat, the County has not ever issued a citation against San Tan Flat for a
22 violation related to these complaints.
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¹ At the time of the hearing in January 2007, Mr. Morris also played a Friday night
dinner show from 5:30-8:30, but no longer plays on Friday nights.

1 CONCLUSIONS OF LAW

2 19. Notwithstanding the statutory construction issues raised by this Court, the Court
3 has also considered the record from the Administrative Proceedings as well as a
4 memorandum submitted in the arguments of counsel. This Court has jurisdiction over
5 Plaintiff's appeal pursuant to the Administrative Review Act, A.R.S. § 12-901 et. seq.
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7 20. A.R.S. § 12-910(E) defines the scope of this Court's review:
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9 The court may affirm, reverse, modify or vacate and remand the
10 agency action. The court shall affirm the agency action unless after
11 reviewing the administrative record and supplementing evidence
12 presented at the evidentiary hearing the court concludes that the
action is not supported by substantial evidence, is contrary to law,
is arbitrary and capricious or is an abuse of discretion.

13 This Court concludes that the Board's decision was not supported by substantial
14 evidence and was contrary to law, arbitrary, capricious, and an abuse of discretion.
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16 21. In determining the propriety of the Board's final decision, this Court views the
17 evidence in the light most favorable to upholding its action and will affirm if the
18 decision is supported by any reasonable interpretation of the record. *See Baca v.*
19 *Arizona Dept. of Economic Security*, 191 Ariz. 43, 951 P.2d 1235 (App. 1998). The
20 Court reviews the record to determine whether there has been "unreasoning action,
21 without consideration and in disregard for facts and circumstances; where there is room
22 for two opinions, the action is not arbitrary or capricious if exercised honestly and upon
23 due consideration, even though it may be believed that an erroneous conclusion has been
24 reached." *Petras v. Arizona State Liquor Board*, 129 Ariz. 449, 452, 631 P.2d 1107,
25 1110 (App. 1981), *quoting Tucson Public Schools, District No. 1 of Pima County v.*
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1 *Green*, 17 Ariz. App. 91, 94, 495 P.2d 861, 864 (1972). The Court does not function as a
2 “super agency” and may not substitute its judgment for that of the Board where factual
3 questions are involved. *See DeGroot v. Arizona Racing Comm’n* 141 Ariz. 331, 686
4 P.2d 1301 (App. 1984). The Board’s legal interpretations and conclusions on the other
5 hand, are not binding on the Court. *Begay v. Arizona Dept. of Economic Security*, 128
6 Ariz. 407, 626 P.2d 137 (App. 1981); *Carondelet Health services v. Arizona Health Care*
7 *Cost Containment System Admin.*, 182 Ariz. 502, 897 P.2d 1388 (1995).

10 22. The central issue presented to this Court is whether Plaintiff Dale Bell is
11 operating San Tan Flat in violation of Pinal County Zoning Ordinance section 1601(b).
12 To resolve that issue, the Court must interpret section 1601(b), which requires this Court
13 to engage in an independent analysis of the ordinance’s plain language. *See Carlson v.*
14 *Ariz. State Pers. Bd.*, 214 Ariz. 426, 430 ¶ 13, 153 P.3d 1055, 1059 (App. 2007) (noting
15 that courts must apply independent judgment “to questions of law, including questions
16 of statutory interpretation and constitutional claims”). Because they pose questions of
17 law, courts interpret ordinances in the same manner as state statutes. *Abbott v. City of*
18 *Tempe*, 129 Ariz. 273, 275, 630 P.2d 569, 571 (App. 1981).

21 23. This Court looks first to the plain language of section 1601(b), and will give
22 words “their ordinary meaning unless the legislature clearly intended a different
23 meaning.” *Roubos v. Miller*, 214 Ariz. 416, 417-418, ¶ 7, 153 P.3d 1045, 1046 (2007);
24 *see also* A.R.S. § 1-213 (2007) (“Words and phrases shall be construed according to the
25 common and approved use of the language.”).

1 24. Section 1601(b) permits the operation of a bar, cocktail lounge, nightclub, or
2 tavern, regardless whether enclosed, within CB2 zoning. A reasonable interpretation of
3 the plain text of section 1601(b) must not conflate a “dance hall,” which must be
4 operated indoors, with a nightclub, which may be operated outside.
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6 25. The plain language of section 1601(b) applies to an “amusement or recreational
7 enterprise” that is a “dance hall.” The key factor in determining a violation of this
8 section is that the primary enterprise is dancing. Tr. at 55:14-16, 56:8-10, 57:8-12.
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10 26. The Pinal County Zoning Ordinance does not explicitly define “enterprise” or
11 “dance hall,” so the Court will look to the common and ordinary usage of these terms.
12 The common and ordinary usage of “enterprise” is something that makes money, a
13 venture designated to forward an activity. Tr. at 37:8-10, 55:15-16. The key to the term
14 “dance hall” is that people know when they go there the primary enterprise is dancing.
15 Tr. at 56:7-10.
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17 27. Defendants erroneously interpreted the intent underlying section 1601(b) as
18 restricting high noise uses to completely enclosed structures. This interpretation is
19 inconsistent with the context in section 1601(b) which lists many potentially high noise
20 uses that are not restricted to enclosed structures. Tr. at 29:17-34:13.
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23 28. The Pinal County Code requires a common or plain use of the term “dance hall.”
24 That plain or common use cannot extend itself to the “non-definition” adopted by the
25 Board. Pinal County asks this Court to use a definition of the term “dance hall” found in
26 a 1955 American Law Report article instead of the ordinary and common usage of the
27 term. The article provides a definition for its own purposes of attempting to make
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1 general statements that cover different types of legal provisions in many states. The
2 definition they relied upon was clear in its own language that it was NOT a definition
3 and should not be construed as a definition. One cannot take such a “non-definition”
4 and turn it into a definition and then multiply such an effect by claiming it is the
5 common use of the term. Such argument entirely ignores the plain meaning of the
6 ordinance, and attempts to spin the definition into whimsical interpretations to effect
7 more violations. The Court in *Padilla v. Industrial Commission*, 113 Ariz. 104, 546
8 P.2d 1135 (1976) thoroughly clarified the issue:

11 The most basic rule of statutory construction is that in construing the
12 legislative language, courts will not enlarge the meaning of simple
13 English words in order to make them conform to their own peculiar
14 sociological and economic views. And this is true even though the
15 Interpretation which the court renders is harsh and uncompassionate.
Equally fundamental is the presumption that what the Legislature means,
it will say. *Id.* At 106, 546 P.2d at 1137.

16 29. San Tan Flat does not violate Pinal County Zoning Ordinance section 1601(b)
17 because dancing is not San Tan Flat’s primary enterprise. Defendants’ interpretation of
18 section 1601(b) as prohibiting “dance hall activities” including live, amplified, outdoor
19 music, a limited menu, the sale of alcoholic beverages, or the mere presence of dancing
20 is erroneous and inconsistent with the statutory language. Tr. at 56:24-25, 57:13, 58:10-
21 11, 21-23.

24 30. Plaintiff’s request for Fees is DENIED.

25 Based on the foregoing, the Court **ORDERS AS FOLLOWS:**

26 A. Pursuant to A.R.S. § 12-910(E) Defendants’ May 17, 2007, Notice of Decision is
27 **REVERSED;**
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B. Defendants' Counterclaims, which are both based on the presumption of a violation of Pinal County Zoning Ordinance section 1601(b), are hereby

DISMISSED WITH PREJUDICE;

C. Plaintiff's remaining constitutional claims are **DISMISSED WITHOUT PREJUDICE;**

D. Because no violation of Pinal County Zoning Ordinance section 1601(b) occurred, Pinal County will refund to Mr. Dale Bell the fines he paid pursuant to the County's citation for violation of that section, specifically \$700 paid in January 2007 plus 10% interest from the date of fine through the date of refund, pursuant to A.R.S. § 44-1201(A).

Dated JUL 21 2008, 2008

BY THE COURT

WILLIAM J. O'NEIL

William J. O'Neil
Superior Court Judge