IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

AWA DIAGNE and AWA BEST BRAIDS LLC, Petitioners/Plaintiffs v. CITY OF SOUTH FULTON, Respondent/Defendant	CIVIL ACTION 24CV010646

FINAL ORDER

Petitioners/Plaintiffs Awa Diagne and Awa Best Braids LLC filed a hybrid petition for review/declaratory judgment action challenging Respondent/Defendant City of South Fulton's denial of Diagne's application for a special use permit to open a hair braiding shop in South Fulton. After the City filed its response to the petition/complaint, Petitioners moved for either (1) an interlocutory injunction enjoining the City from barring Diagne from opening her shop or (2) a final order reversing the City's decision. The Court held a hearing on Petitioners' motions on 8 November 2024. All parties participated. For the reasons set forth below, the Court GRANTS Petitioners' motion for a final order reversing the City's decision and DENIES Petitioners' motion for an interlocutory injunction.

Awa Diagne has been braiding hair for over thirty years. With visions of starting a vibrant new business in her community, she leased space in a shopping center in South Fulton to open a hair braiding shop. Hair braiding shops are classified as "beauty salons" under the City's zoning ordinances and require a special use permit. Diagne submitted her application for a special use permit to open a non-chemical braiding shop on 10 April 2024.

Diagne's application was subject to three levels of review. The first reviewing body was the City's Department of Community Development and Regulatory Affairs, Planning & Zoning

Division ("Staff"). The Staff issued detailed written findings and recommended approval of the permit. Among its findings was the Staff's conclusion that Diagne's proposed use was consistent with the City's Comprehensive Plan.[1] The Staff also found the proposed use to be compatible with adjacent land uses and determined it would not affect the overall balance of land uses or character of the neighborhood. The Staff noted in its report that a public participation meeting was held on 17 June 2024 that drew community support for Diagne's application. However, some participants at the meeting did raise concerns about "how the ordinance is keeping small businesses from flourishing." (R-53).

The second body to review Diagne's application was the City's Planning Commission. The Commission held a meeting on 26 June 2024. Like the earlier public participation meeting before the Staff, this session drew support and opposition to Diagne's plan to open a braiding salon. The most forceful opposition at the Planning Commission came from the owner, employees, and clients of Salon Vibez -- a beauty salon located in the same shopping center where Diagne hoped to start her own equally important small business. The Salon Vibez faction challenged Diagne's application on two bases: (1) the number of beauty salons already in the area and (2) the adverse competitive impact Diagne's shop might have on Salon Vibez' business. After hearing these concerns, the Planning Commission, like the Staff, voted to recommend approval.

The third and final reviewing body was the City Council. The Council held a public hearing on the application on 9 July 2024. Prior to the hearing, the owner, employees, and clients of Salon Vibez sent councilmembers e-mails reiterating their concerns. The owner of Salon Vibez wrote about her fears of such direct competition. (R-36). She also appeared at the hearing and verbally opposed Diagne's application.

[1] The City adopted its Comprehensive Plan to guide decisions about the City's growth and development.

The Council voted on Diagne's application at its 23 July 2024 meeting. One councilmember moved to deny the application. She expressed the importance of balanced economic development and the need to avoid "saturation". She told Diagne (referring to her by her first name) that the City *did* want Diagne to open her shop in South Fulton, but in a location where she would not be competing with any similar businesses. With no further discussion, and no explanation from any of the other three votes cast against granting the permit, the Council voted 4-3 to deny the permit. The Council affirmed the minutes of the 23 July 2024 meeting at its 13 August 2024 meeting. It never drafted any written decision.

Petitioners filed their petition for review and complaint for declaratory judgment,[2] injunctive relief,[3] and attorney's fees[4] on 22 August 2024. A central theme running throughout their petition/complaint is that this case is about unconstitutional economic protectionism; that the City may not refuse to issue a business permit to protect the commercial interests of an existing and potentially rival business; that here, in America and in Georgia, the competitive marketplace determines which businesses thrive and which do not -- without the government paternalistically interfering in that process by shielding an existing business from the potentially competitive impact of a new one. On the drier, more technical side, with respect to the petition for review component of their petition/complaint, Petitioners argue that the City's decision was not supported by sufficient evidence.

At the 8 November 2024 hearing before this Court, Petitioners asserted that a ruling that the City's decision was not supported by sufficient evidence would "moot everything else." The

[2] Petitioners seek a series of declarations that the City's denial, special permit requirement, and treatment of new businesses are unconstitutional under the State Constitution.

[3] Petitioners seek injunctive relief allowing them to operate the braiding shop and prohibiting the City from interfering with their operation.

[4] Petitioners seek fees under O.C.G.A. §§ 5-3-20, 9-4-9, 9-15-14, and 13-6-11.

Court understands Petitioners' statement to mean that they intended to abandon their remaining claims and requests for relief should the Court rule in their favor on the petition for review. The City, for its part, argued that adjudicating the petition for review was the *only* appropriate avenue of review and that Petitioners' other claims for relief were either not properly before the Court or without merit (or both). Given this posture, the Court addresses the petition for review first.

A local government's decision on a special use zoning permit is quasi-judicial in nature; it is not legislative. *City of Cumming v. Flowers*, 300 Ga. 820, 823–24 (2017); *Moon v. Cobb County*, 256 Ga. 539, 539 (1986). That means the decision is subject to appellate review in Superior Court by way of a petition for review filed pursuant to Title 5 of the Official Code of Georgia. O.C.G.A. § 36-66-5.1(a)(2); O.C.G.A. § 36-66-3(4)(E). This review is confined to the record.[5] O.C.G.A. § 36-66-5.1(a)(2); O.C.G.A. § 5-3-5(a)(1); *Forsyth County v. Mommies Properties*, 359 Ga. App. 175, 184 (2021). That record includes any findings of fact adopted by the decision-making body below. In conducting its review, the Court shall

> (1) Review only matters raised in the record of the proceeding in the lower judicatory;
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> (2) Accept the findings of fact and credibility of the lower judicatory unless they are clearly erroneous;
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> (3) Accept a decision regarding an issue within the sound discretion of the lower judicatory unless such a decision was an abuse of discretion;
>
> (4) Determine whether the final judgment was sustained by sufficient evidence; and
>
> (5) Review questions of law *de novo*.

[5] Petitioners' alternative request for a *de novo* review of the City's decision-making process (set forth in Count 2 of their petition/complaint) is therefore denied.

O.C.G.A. § 5-3-5(a). At the end of its review, the Court must enter a judgment upon the petition, dismiss it, remand it with instructions, or engage in any combination thereof. O.C.G.A. § 5-3-18(a)(1).

The Court finds that reversal is appropriate here. Section 804.03(a)(1) of the City's zoning ordinances provides that the Council "shall adopt findings of fact supporting their decision." In "preparing" those findings of fact, the Council is required by its own Code to consider the twenty separate standards for review set forth in Section 803.06. § 804.03(a)(3). It is undisputed that the Council did not prepare any written findings of fact, meaning that the record from the Council's review of Diagne's application consists of (1) the reports of the Staff and Planning Commission (both of which recommended *approving* the application), (2) a passel of e-mails written or solicited by a disgruntled businessowner who plainly feared the competition that Diagne's salon represented and wanted to be protected from that "threat", and (3) YouTube videos of the two relevant Council meetings. A review of the YouTube videos reveals that no oral findings of fact were made to supplement (or contradict) the written findings of the Staff and the Planning Commission (other than one councilmember's musings on the need to avoid locating competing businesses near each other).

Petitioners argue that the Council's failure to prepare or at least propound *any* findings of fact, let alone findings related to the twenty factors, requires reversal. The City responds by denying that it was required to prepare findings of fact -- and that if it were required to do so, the councilmember's statements from the meeting suffice as findings.

Were it that simple for the City… Fact-finding when making rulings on matters of such consequence as the issuance of a business license -- a license to earn and to strive and grow -- is not optional, for at least two important reasons. First and foremost, the City's own ordinances

require it. Second, appellate courts need it: to survive, a challenged ruling must be capable of review so that the reviewing court can, per O.C.G.A. § 5-3-5(a), determine whether the decision below was supported by sufficient evidence and was not an abuse of discretion. Thus, while written findings of fact are not explicitly called for in the City's zoning ordinances, *some* findings are. Silence is not sufficient. Written findings certainly make it easier for the reviewing court to determine the validity of the municipal decision than having to listen to a recording of a city council meeting, but a sufficiently detailed oral record with specifically delineated factual findings could in theory enable a reviewing court to discern a factual basis and a non-arbitrary reason for rejecting an application approved by two other levels of local government where the expertise in zoning and land use is concentrated. But that did not happen here.

So what was the record that the City Council made at the meeting at which it rejected Diagne's special use permit in the face of approval recommendations from both the Staff and the Planning Commission? A silent "No" vote supported by a brief speech about the need to protect local business (from local business…) by one (not all four) of the councilmembers who rejected Diagne's application. While that one short presentation obliquely addressed several of the factors the Council was required to consider,[6] it made no mention of most of the land use characteristics the Council was obligated to assess when adopting or rejecting a special use permit application. And that was the *only* comment made before the vote was taken. Three quarters of the Councilmembers rejecting the application said nothing, wrote nothing, found nothing. There is no record of the basis for their decision. Just an arbitrary "No." Was it the additional vehicular traffic

[6] Consideration of the economic impact of a new business on an existing business arguably constitutes an assessment of the "[a]vailability of other land suitable for proposed use and effect on balance of land uses" as well as the proposed special use's "effect on adjacent property" (required factors 15 and 18 from Section 803.06(b) of the City's zoning ordinances). Such consideration does not address more than a dozen other required factors.

this business would draw? Was it the signage (or lack of signage)? Were the hours of business going to be incompatible with the surrounding uses? Was it the concern that an existing business might feel competitive pressures from Diagne's business? The *written* record, from the Staff and the Planning Commission, addressed those factors (and others) and found that the special use permit was compatible with each and so should be granted. When a majority of the City Council voted to change course and overrule the conclusions of the Staff and the Planning Commission -- a decision which, to be clear, was fully within the Council's purview, *City of Roswell v. Fellowship Christian Sch., Inc.*, 281 Ga. 767, 769 (2007) -- that majority owed Diagne (and the general public it was elected to serve) a proper and thorough fact-based explanation for that denial of Diagne's right to open and operate a business of her choosing in the community.

That spare record, seasoned only with protectionist arguments from one of the four votes against allowing Diagne to ply her legal trade in South Fulton, does not suffice. While there does not have to be much competent evidence in the record to support a challenged quasi-judicial action such as granting or denying a special use permit, there must be some. The *only* evidence as to most of the factors the City Council was required to consider was the Staff and Planning Commission's positive assessment that Diagne should be authorized to start her fledgling business and help grow the South Fulton economy. The *only* evidence articulated that could be construed to support a "No" vote -- the anticompetitive stance of the one councilmember and her constituent who wanted to maintain a haircare monopoly in the strip mall in question -- runs contrary to Georgia's long history of constitutional jurisprudence that "entitles Georgians to pursue a lawful occupation of their choosing free from unreasonable government interference," and so cannot sustain the City's action. *Raffensperger v. Jackson*, 316 Ga. 383, 388 (2023) (citation omitted).[7]

[7] The City argued that the concern raised about protecting an existing South Fulton business from the competitive threat of a new South Fulton business constitutes "some evidence" upon which the quasi-judicial decision was properly

Faced with the record the City made (and did not make), the Court is left to conclude that the City's decision was arbitrary and thus an abuse of discretion. *See Riley v. S. LNG, Inc.*, 300 Ga. 689, 691 (2017) (arbitrary government action constitutes abuse of discretion). The Court hereby enters final judgment on Petitioners' petition for review (Count I) and REVERSES the City's decision to deny Diagne's application for a special use permit and ORDERS the City to grant the application *instanter*. The Court has already denied Count II of Petitioners' petition/complaint. *See* n. 5. The Court deems the remaining counts and requests for relief abandoned. There being no further business before the Court, the Clerk is directed to close this case.

SO ORDERED this 16th day of December 2024.

Judge Robert C.I. McBurney
Superior Court of Fulton County
Atlanta Judicial Circuit

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based, thereby requiring appellate affirmation of the City Council's decision. That is indeed the only basis provided by the one councilmember who spoke before the vote was taken. It is not, however, a proper or sufficient basis to deny Diagne her right to pursue a lawful occupation. The Supreme Court recently reaffirmed that a governmental impingement on one's ability to engage in a lawful business such as Diagne's is "only constitutional if it is reasonably necessary to advance an interest in health, safety, or public morals." *Raffensperger*, 316 Ga. at 391 (2023). The City has not persuaded this Court that protectionism falls into any of these three categories -- likely because it does not.