ST. TAMMANY PARISH

NUMBER: 2011-11620

DIVISION: F

VERSUS

22ND JUDICIAL DISTRICT COURT

PARISH OF ST. TAMMANY

CONCERNED CITIZENS OF LACOMBE, INC., ET AL

STATE OF LOUISIANA

FILED: August 26, 2011

DEPUTY CLERK

REASONS FOR JUDGMENT

This matter came before the Court on a "Petition for Declaratory Judgment" and an "Exception of Prescription" brought by St. Tammany Parish and IESI LA. Corporation, and a "Reconventional Demand" seeking a declaratory judgment and injunctive relief brought by the Concerned Citizens of Lacombe ("CCL"). The Court heard the exceptions on June 14, 2011 and the trial on July 11, 2001. The Court left the record open so that CCL could take the deposition of Kevin Davis on August 4, 2011 and gave the parties one week following the deposition to submit post-trial briefs. The Court now issues these Reasons for Judgment.

St. Tammany Parish's "Petition for Declaratory Relief" and St. Tammany Parish and IESI's "Exceptions of Prescription:

Facts:

On December 1, 2010, the St. Tammany Parish Department of Permits and Regulatory issued building permit K10-1297 to IESI LA Corporation ("IESI"), approving IESI's planned construction of a new office and maintenance building on a parcel of property located on Highway 434, approximately 1/4 of a mile south of Interstate 12 in Lacombe, Louisiana. On December 2, 2010, the St. Tammany Parish Department of Permits and Regulatory issued building permit number K10-1298 to IESI, approving IESI's planned construction of a Non-processing Waste Transfer

Station on the same parcel of property. On December 6, 2010, these permits were posted on the St. Tammany Parish website. On December 15, 2010, the St. Tammany edition of *The Times-Picayune* reported that the two permits had been issued.

On January 6, 2011, J.C. Hymel sent a letter to the Department of Planning addressed to Sidney Fontenot, the Director of the Planning Department for St. Tammany Parish, requesting that the permits be rescinded. Mr. Fontenot sent a letter to Mr. Hymel dated January 10, 2011, stating that his request to appear before the Board of Adjustments was untimely under Louisiana law, as it was delivered to the Department of Planning beyond the thirty day time period for an appeal of an administrative decision. Paul Leary, Sr. wrote a letter to Sidney Fontenot received on January 10, 2011 alleging that the permits were issued without informing the public. Mr. Fontenot replied to Mr. Leary that the appeal was untimely.

On February 28, 2011, plaintiff, Concerned Citizens of Lacombe, Inc. ("CCL") sent a letter to Kenneth Wortmann, Director of the Department of Permits and Regulatory for St. Tammany Parish, requesting that he suspend and revoke the permits. Mr. Wortmann advised plaintiffs by letter that he would not do so. On March 11, 2011, CCL submitted a "formal appeal". They were informed by Ron Keller, Senior Planner of the St. Tammany Parish Planning Department and Secretary of the Board of Adjustment, that the appeal was untimely.

St. Tammany Parish filed a "Petition for Declaratory Judgment", seeking a determination that the 30 day period provided by La. R.S. 33:4780.46(B)(2)(a) for appeals to the Board of Adjustment controls the rights and relations of the parties to this matter, and that the defendants failed to timely appeal the issuance of the permits. The Parish and IESI also filed "Exceptions of Prescription" which were deferred to the merits of this hearing. On May 10, 2011, CCL filed a Reconventional Demand

against St. Tammany Parish, seeking a Permanent Injunction and Declaratory Relief with this Court.

Law and Findings:

La. R.S. 33: 4780.46(B)(2)(a) provides as follows:

> "Appeals to the board of adjustment may be taken by any person aggrieved or by any officer, department, board or bureau of the parish affected by any decision of the administrative officer. An appeal shall be taken within thirty days, as provided by the rules of the board, by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal specifying the grounds thereof."

The Court first finds that La. R.S. 33:4780.46(B)(2)(a) controls the rights and relations of the parties in this matter. The facts as set out above support that the appeal in this matter was not timely filed. The permits at issue were posted on the Parish's website on December 6, 2010. The thirty days began to run when the permit was issued therefore at the time the appeal was filed, the thirty days had expired.

The Court notes that the Parish's procedure for informing the public regarding the issuance of permits on its' website is lacking. The website does not state that the permit was issued for the construction and operation of a waste transfer station, only that it was issued for "new construction." The permit on the website does not even state that the permit was issued to IESI. Further, the only way a citizen could find out that a permit was issued by way of this website is to either search for it by permit number or by date range and to know that a permit had been issued. Even though this procedure of notice is lacking, the issuance of the permits was published in the *Times-Picayune* on December 15, 2010.

Accordingly, the Parish's "Petition for Declaratory Judgment" is granted based on the reasons outlined above.

The issues raised in the "Exceptions of Prescription" are the same as the issues

in the Parish's "Petition for Declaratory Judgment". The Court has found that the appeal was not filed timely, and therefore finds the "Exceptions of Prescription" should be granted.

CCL'S Reconventional Demand for Declaratory Relief and Injunctive Relief:

Next, the Court must address the issues raised by CCL in it's Reconventional Demand seeking a Permanent Injunction and Declaratory Relief, because if the permit was invalidly issued under the claims made by CCL, the fact that the appeal was not timely filed is of no merit.

CCL makes the following allegations in their Reconventional Demand. They argue that Mr. Wortmann acted improperly in approving and issuing the permits. CCL asserts that the Parish violated CCL's due process rights in not providing it a hearing before the Parish Board of Adjustments, and that the industrial zoning sections of the UDC are unconstitutional because they allegedly lack objective criteria by which Fontenot could add new uses. Further, Fontenot interpretation of the I-2 Industrial District as allowing waste transfer stations as a permitted use was arbitrary and capricious and exceeded his authority. Finally, IESI's proposed waste transfer station would irreparably harm the environment and the people of the Lacombe community. The Court notes that the Attorney General's office was properly served with this Reconventional Demand by CCL, so the Court can consider the constitutionality claims in this matter. La. Code of Civil Procedure article 1880.

Facts:

At trial, Sidney Fontenot testified his determination that a waste transfer station is a permitted use in a I-2 industrial district was based on his examination of the 1) purpose and 2) types of permitted uses in the UDC. Fontenot agreed during his trial testimony that there are no objective...criterion that place definitions on the terms

used in the definition for the "purpose" of these zoning districts. He also considered whether or not allowing a waste transfer station in a I-2 Industrial District would result in an "inherent conflict" between the proposed use and other uses, and he concluded it did not. Fontenot testified that waste transfer stations are not listed in the definition of a "public utility", which is a permitted use in the I-2 Industrial District. However, Fontenot noted that he used the definition of "utility", which has a separate definition in the UDC than "public utility", to make his determination that the waste transfer station was a permitted use under I-2 Industrial District.

In deciding that the waste transfer station was a permitted use, Fontenot also relied on the Land Based Classification System ("LBCS"). In addition, he concluded that a waste transfer station falls within the definition of a "warehouse". A "warehouse" is defined as "a building used primarily for storage of goods and materials." Fontenot admitted during his testimony that a waste transfer station does not actually fit the definition of "warehouse", as the primary purpose of a waste transfer station is not the storage of goods and materials. Further, it was pointed out at trial that he approved a waste transfer station on Highway 25 as a "conditional use" in the M-2 Industrial Zoning District under the old parish ordinance.

Stephen Villavaso, an expert in city planning with extensive experience in the field of planning, permitting and operation of waste transfer stations, testified that in his opinion, the UDC does not contain standards for the addition of permitted uses in the I-2 Industrial District. He based his opinion on the fact that he could not find any measurable or objective standards within the UDC. Villavaso noted that while each Industrial Zoning District classification has a purpose, he found that the purposes of the I-2 through I-4 industrial zoning districts were all the same, so it was not helpful to him in terms of distinguishing one classification from another. He

testified that characterizing a waste transfer station as a "Public Utility" under the UDC in this matter is inappropriate because it doesn't refer to garbage or solid waste.

Further, Villavaso stated that a planner should operate within the four corners of the zoning ordinance, and it is not typical for a planner to go to the LBCS. The LBCS is sometimes used as a tool for planners to write their codes initially but that it does not exist in the UDC, Villavaso testified. He noted that Fontenot was not wrong to check it, but in his opinion he should have stayed within the UDC in making his decision. Villavaso testified that Fontenot's interpretation was still erroneous under the LBCS because under the LBCS a waste transfer station is permitted only under "heavy industrial", which is not analogous to the I-2 industrial zoning district because only the I-3 and I-4 districts are labeled "Heavy Industrial."

In Villavaso's opinion, Fontenot's reliance on the zoning classifications of properties where other waste transfer stations are currently located is incorrect, as the permits allowing those uses, were granted as a conditional use permit or a non-conforming use. He opined that a good planner would not ever want to create another non-conforming use in their community. Villavaso also testified about the potential environmental impact the waste transfer station might have on the area. Specifically, smells, vectors (rats, sea gulls, insects, flies), and leachate (water that touches the garbage and leaks on to the roads as the trucks go into the facility). In his opinion, the leachate could not be alleviated by a concrete floor because the water would still leak on the roads as the trucks go into the facility.

Law and Findings:

The Director of Planning for the Parish, is responsible for the administration, enforcement, and interpretation of land use controls, as well as the issuance of building permits. Section 3.01 of the UDC and Section 4-08. La. R.S. 40:1730.23

(C) provides: "In the enforcement of any...regulations governed by La. R.S. 33:4771 et seq., the performance or non-performance of any procedure by a governmental ...official shall be deemed to be a discretionary act and shall be subject to the provisions of R.S. 9:2798.1". Even though the government official has discretion in interpreting land use controls, his actions can not be an arbitrary and capricious abuse of discretion.

The Louisiana Supreme Court held in McCauley v. Briede, 90 So. 2d 78, 82 (La. 1956) as follows:

> "It is a fundamental rule, fully applicable to zoning ordinances, that an ordinance must establish a standard to operate uniformly and govern its administration and enforcement in all cases, and an ordinance is invalid where it leaves its interpretation, administration, or enforcement to the unbridled or ungoverned discretion, caprice, or arbitrary action of the ... of administrative officials."

The Court further found:

> "A zoning ordinance that fails to establish a sufficiently adequate and definite guide to govern officials with respect to grant of variances, exceptions, or permits is void."

In making it's findings on CCL's Reconventional Demand, the Court would like to first point out that the evidence shows that the Parish Council was aware in August of 2010 that there was a problem with the issuance of permits for waste transfer stations within the UDC. Two councilmen expressed concern at the August 5, 2010 Parish Council meeting regarding this issue with one councilman stating: "We do not have an ordinance in place that will allow the administration with a high degree of confidence to move forward to grant a permit..." Further, another councilman stated: "We need to keep on working with everyone and get it right the first time."

Further, the attorney for the Parish stated at that meeting:

"There are no standards; there is no criteria or standard that

currently exists as it relates to a waste transfer station. I think it is imperative to have those standards in place before any construction begins. Otherwise we are faced with litigation; we are faced with the potential of construction commencing, the possibility there would be a vested right there, the possibility- and I think the likely possibility-that there is a threat to the public health, safety, and welfare..."

At the Parish Council meeting in July of 2010, Fontenot was asked the question that if someone came into his office and wanted to develop a waste transfer station, what zoning would they need? Fontenot stated that it (waste transfer station) is not listed in the ordinance so it effectively could not be constructed.

As noted above, the law requires there to be objective, measurable standards regarding zoning ordinances. At the trial, Fontenot testified that his interpretation of the waste transfer station as a permitted use in I-2 was based on the 1) purpose and 2) types of permitted uses. However, I-2, I-3, and I-4 Industrial Districts all state the same purpose in the UDC which is "to provide for the location of industrial uses of large scale and highly intense uses along major collectors and arterials in such a fashion and location as to minimize the conflict with nearby residential uses." Fontenot agreed during his trial testimony that there are no objective...criterion that place definitions on the terms used in the definition for the "purpose" of these zoning districts. Therefore, the stated purpose in the UDC can not be used as an objective criterion by which to add a new use or allow a use that was not listed as a permitted use. This is further supported by the testimony given by Stephen Villavaso who noted that while each zoning classification has a purpose, "the purposes were all the same" so it was of no use to him in terms of distinguishing one from the other.

Fontenot testified that in interpreting the use, he considered whether a waste transfer station use was in "inherent conflict" with other permitted uses in the I-2 district such as dairy manufacturers, fruit and vegetable canneries, food product

manufacturers, beverage distillers, and confectionery manufacturers. The record supports there is no provision within the UDC which provides an "inherent conflict" standard to govern the interpretation of the provisions of that district to allow additional uses.

A "public utility" is a permitted use in the I-2 Industrial District and is defined in the UDC as "Any person, firm or corporation duly authorized to furnish under public regulation to the public electricity, gas, steam, telephone, telegraph, transportation, water or sewerage system." Fontenot testified that he construed the definition of "public utility" to include the definition of a "utility", which is not a permitted use in the I-2 industrial district. The definition of "public utility" does not include anything relating to garbage or solid waste, and there is a separate definition for "utility". Stephen Villavaso testified that characterizing a waste transfer station as a public utility under the UDC is inappropriate. Fontenot also admitted he was wrong in concluding that a waste transfer station fit the definition of a "warehouse" under the UDC.

First, the Court notes that while the Director of Planning, Fontenot, has the authority to "interpret land use controls" under the UDC, that power of interpretation is not limitless and must not be a arbitrary and capricious determination. The factors Fontenot used in his analysis to make the interpretation that a waste transfer station is a permitted use in a I-2 Industrial District were subjective and not specified in the UDC. Further, under the UDC, the provisions for the I-2 Industrial District fail to establish a sufficiently adequate and definite guide to govern officials with respect to grant of permits. These provisions do not provide objective, measurable standards to interpret additional permitted uses in I-2 Industrial District under the UDC. The Court finds the totality of the facts and the testimony presented, in addition to the

opinion of Stephen Villavaso, support that Fontenot's decision to add a waste transfer station as a permitted use under the I-2 Industrial District was arbitrary and capricious.

Further, Fontenot allowed a waste transfer station on Highway 25 as a conditional use in the M-2 Industrial Zoning District under the old Parish zoning ordinance. The M-2 district also listed "public utility facility" as a permitted use, as does the current I-2 Industrial Zoning District and the definition is the same under the old ordinance as in the UDC. Fontenot's interpretation of the prior ordinance to allow the Highway 25 waste transfer station as a conditional use mandated public notice and a public hearing. This did not occur in the pending matter, as the issuance of a permit in the I-2 Industrial District does not require a public hearing.

In fairness to Fontenot, he was placed in a position to make a decision without sufficient guidelines, standards or a meaningful "purpose" definition under the I-2 Industrial District provisions of the UDC to assist him in his decision to issue the permit. Fontenot's arbitrary and capricious interpretation of the ordinance is further support that the I-2 Industrial District classification of the UDC does not establish a sufficiently adequate and definite guide with respect to the granting of permits as required under the McCauley case.

In summary, the Court finds that the I-2 Industrial District classification of the UDC is unconstitutional under McCauley to the extent that they provide no standards or definitive guidelines to add a waste transfer station as a permitted use. Further, the Court finds that Fontenot and the Department of Planning were arbitrary and capricious in issuing permit K10-1298 and this amounted to an inappropriate delegation of authority for the reasons set out above. Therefore, the permit is invalid and is revoked.

These Reasons for Judgment do not constitute a written judgment. Counsel for CCL is instructed to submit a judgment within ten days in conformity with these Reasons for Judgment.

Covington, Louisiana, this 25 day of August, 2011.

Judge Martin Coady