

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF PENNINGTON)

IN THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

STEVE WYNIA, DAMON REEL, and
REEL WYNING, L.L.C., a South Dakota
limited liability company,

Petitioners,

v.

CITY OF RAPID CITY, SAM KOOIKER,
in his official capacity as Mayor,
RAPID CITY COMMON COUNCIL, CITY
COUNCIL MEMBERS GARY BROWN,
CHARITY DOYLE, STEVE LAURENTI,
RITCHIE NORDSTROM, DAVE DAVIS,
JERRY WRIGHT, JORDAN MASON,
JOHN B. ROBERTS, BONNY PETERSON,
and RON SASSO, in their official capacities,

Respondents.

Civ. No. 11-1814

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW
AND ISSUANCE OF
WRIT OF MANDAMUS**

This matter came on for trial on November 21, 2013 before the Honorable Wally Eklund. Petitioners appeared by and through their counsel of record, Richard E. Huffman. Respondents appeared by and through their counsel of record, Wade Nyberg. The Court having considered the testimony of the witnesses, the exhibits introduced at trial, the arguments of counsel and otherwise being advised in the premises, does hereby enter the Following Findings of Fact and Conclusions of Law and Issuance of Writ of Mandamus:

FINDINGS OF FACT

1. On June 8, 2011 Steve Wynia, Damon Reel, and Reel Wying, L.L.C., (hereinafter collectively referred to as "Petitioners") filed a petition with the City of Rapid City

requesting issuance of a Conditional Use Permit (hereinafter “CUP”) to operate an on-sale liquor establishment in connection with a planned video lottery casino.

2. Steve Wynia and Damon Reel were, at all times relevant hereto, residents of Pennington County, South Dakota, and are the members of Reel Wyning, L.L.C., which is a South Dakota limited liability company with its principal place of business in Rapid City.

3. Respondent City of Rapid City is a municipal corporation organized under the laws of South Dakota. Respondent Sam Kooiker is and at times relevant hereto was Mayor of Rapid City, and is a Respondent in his official capacity. All other Respondents were members of the Rapid City Common Council at the time of the action and are named in their official capacities.

4. The Petition for Writ of Mandamus pertains to the denial of Petitioners’ request for a CUP, specifically *Request No. 11UR014*, for the real property legally described as:

Lots 1, 2, 3 and 4 of Block 26 of South Boulevard Addition,
Section 12, T1N, R7E, BHM, City of Rapid City, Pennington
County, South Dakota.

This property is more generally described as being located at 703 and 705 Indiana Street, Rapid City, South Dakota 57701 (hereinafter “Subject Property”).

5. The proposal for the Subject Property was to construct a 3,960 square foot building that included 1,980 square feet for the on-sale liquor establishment and 1,980 square feet of general commercial space. The site plan for the proposal is included with Stipulation of Record (“Record”) pp. 25-28.

6. The zoning of the Subject Property is General Commercial. Record p. 17.

7. The zoning immediately to the east of the Subject Property is Low Density Residential, and the area to the east is an older, established residential area with single family homes. *Id.*

8. The zoning to the north, south, and west of the Subject Property is General Commercial. *Id.*

9. On-sale liquor establishments are conditional uses in a General Commercial Zone. Rapid City Municipal Code (RCMC) § 17.18.030(17).

10. There are a number of other commercial entities and operations in the same and immediate area as the Subject Property. For example and not by way of limitation, the Subject Property is located near an Arby's restaurant, a Sonic restaurant, as well as a healthcare business, Interim HealthCare, among a number of other business entities and operations in the immediate vicinity. *Id.*

11. Petitioners have conducted their own traffic studies in connection with their proposed CUP application. This information was provided to Respondents in connection with and in support of Petitioners' application. Said traffic studies revealed the following traffic counts and traffic information at these various business operations in the vicinity:

Arby's – 216 cars (64 cars per hour).
Sonic – 390 cars (97.5 cars per hour).
Interim HealthCare – 180 cars (4.5 cars per hour).

Record pp. 64-72.

12. General traffic on Indiana Street going east totals approximately 120 cars per hour going each direction. McDonald's is also located near the Subject Property and services approximately 1,200 customers per day traveling along Cleveland Street. *Id.*

13. Petitioners own and operate two other video lottery casinos in Rapid City. Petitioners submitted evidence and information showing that the number of customers for their other casinos averages between 2-5 patrons per hour. Record pp. 132-135.

14. Petitioners' proposed conditional use will not increase traffic in either the commercial or residential areas, and to the extent it does any such increase will be minimal. *Id.*

15. Beer sales at the other casinos owned by Petitioners in Rapid City are minimal and average out to less than approximately one beer being sold per hour. This information was also provided to the Respondents in support of the requested CUP. *Id.*

16. Petitioners proposed that they would construct the commercial strip mall structure such that the front of the proposed establishment would face to the west, and the back of the building would be on the lot line to the east so as to reduce or completely obviate any business activity between the building and the residential property across the street to the east. *Id.*

17. Petitioners also proposed to screen the property with a vegetative buffer or to otherwise consider screening the property from the residential area to the east in a manner the City "saw fit." Petitioners also offered to screen the property in any fashion that the City requested. Record pp. 62-63.

18. Petitioners also proposed recording a Declaration of Restrictive Covenants indicating that the property could not be used for an on-sale retail liquor license without the consent of the City of Rapid City to alleviate any concerns that the building might later be converted to a traditional bar.

19. There are other video lottery casinos located in Rapid City that border residential property, specifically including, but not limited to: Smiley's Pizza at 2101 Mt. Rushmore Road; Toby's Casino at 710 and 714 Cleveland Street; Rushmore Casino at 1808 Mt. Rushmore Road;

Jokers Casino at 1320 Mt. Rushmore Road; and Lucky D's Casino at 1330 East St. Patrick Street. Record pp. 62-63, 73-74.

20. In 1995, Toby's Casino was approved for a CUP. Toby's Casino is located on the same block as the Subject Property. Record pp. 17-21.

21. The location for Toby's Casino is directly behind Petitioners' location to the south and is not buffered from the residential neighborhood to the east across an interior street.

22. The City adopted its long range plan prior to granting Toby's a CUP. Exhibit A.

23. Petitioners' application for the CUP was reviewed by the Rapid City Growth Management Staff for compliance with municipal ordinance requirements, including the specific requirements of Sections 17.54.030 and 17.50.185 of the Rapid City Municipal Code. The Staff Report is included with the Record pp. 17-21.

24. The Staff Report dated July 7, 2011, recommended that the conditional use permit be denied. The Staff Report recommended denial of the CUP application stating that the proposed screening "does not sufficiently buffer" the adjacent residential development from the purported negative effects from the increase in noise, light and traffic nuisances and that "to allow the proposed on-sale liquor establishment next to an established residential district is not in compliance with the adopted comprehensive plan." The Staff Report further states that for this Subject Property location, "the applicant has proposed similar Conditional Use Permit requests to allow an On-Sale Liquor Establishment on two previous occasions. On both occasions the permit was denied. There have been no changing conditions in the neighborhood to support approving the request at this time." *Id.*

25. Petitioners submitted an application for a CUP on or about December 9, 2005 (Request No. A5UR021). At that time, the Staff Report recommended approval of the CUP. Record pp. 273-73.

26. The 2011 Staff Report also noted that there are “several other on-sale liquor establishments along Mount Rushmore Road including: the Roadway Inn, Eighth Street Lounge and Casa Real.” The 2011 Staff Report also indicated that “Toby’s Casino South is located on adjacent property to the south, northwest of the intersection of 7th Street and Cleveland Street.” The 2011 Staff Report did not specifically indicate or find an undue concentration of similar uses to cause blight, deterioration or substantially diminished or impaired property values. Record pp. 17-21.

27. On July 7, 2011, the Rapid City Planning Commission denied the application for the conditional use permit. The Rapid City Planning Commission denied the conditional use permit application “due to insufficient buffering between the proposed use and the residential neighborhood.” Record pp. 188-203.

28. Petitioners timely appealed the Planning Commission’s denial to the Rapid City Common Council. The Rapid City Common Council undertook to hear Petitioners’ appeal on August 1, 2011, and September 6, 2011. At the August 1, 2011, Council meeting, a motion was made to continue the decision on the appeal to the September 6, 2011, City Council meeting to allow time to obtain answers to certain questions that had been raised relating to buffering and traffic impact on the residential area to the east. A copy of the minutes from the August 1 City Council meeting are included in the Record at pp. 154-167.

29. At the City Council meetings, the Rapid City Common Council heard evidence that the video lottery casinos are by nature low traffic businesses. Petitioners own and/or operate

two other casinos in Rapid City. On average, these casinos sell approximately 14 beers over a 15 hour period, or less than one beer per hour, and that the number of patrons at Petitioners' other casinos averaged between 2 to 5 customers per hour. Video of August 1, 2011, meeting.

30. Petitioners' appeal was heard again by the Council on September 6, 2011. The City Council, by a 5-3 vote, denied the application based upon insufficient buffering with respect to the residential area to the east. A copy of the minutes from the September 6 City Council meeting are included in the Record at pp.75-104.

31. Petitioners' proposed use will not adversely affect the use of any place used for religious worship, school, park, playground, or similar use within a 500 foot radius. Record p. 18.

32. There is no relevant or competent evidence to establish that Petitioners' requested use is insufficiently buffered with respect to the residential property to the east.

33. There is no relevant or competent evidence that Petitioners' proposed use would result in light or traffic nuisances.

34. There is no relevant or competent evidence to suggest that Petitioners' proposed use will create an undue concentration of similar uses, so as to cause blight, deterioration, or substantially diminish or impair property values.

35. There is no relevant or competent evidence to suggest that Petitioners' proposed use will increase the flow or amount of traffic in the area from that which already exists.

36. To the extent any of these Findings of Fact are Conclusions of Law, they are re-designated as such.

Based upon the foregoing Findings of Fact, the Court now makes and enters the following:

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter of this action.
2. This action involves a justiciable controversy which is suitable and ripe for resolution.
3. South Dakota law recognizes the Court's power to issue a writ of mandamus "to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station . . ." S.D.C.L. § 21-29-1.
4. A writ of mandamus has a narrow application and may be issued only if the applicant can demonstrate a "clear legal right to performance of the specific duty sought to be compelled" and the respondent has "a definite legal obligation" to perform that duty. *Jensen v. Lincoln County Bd. of Com'rs*, 2006 S.D. 61, ¶ 10, 718 N.W.2d 606, 610 (quoting *Sorensen v. Sommervold*, 2005 S.D. 33, ¶ 6, 694 N.W.2d 266, 268 (citation omitted)).
5. Respondent City Council had an independent and nondelegable duty to review and consider Petitioners' application for a conditional use permit regardless of the Planning Commission's decision. RCMC §17.54.030.
6. The Planning Commission and City Council's failure to grant a CUP based on the following was not substantiated by the evidence: (1) that the proposed use would create an undue concentration of similar uses; (2) that the proposed on-sale liquor establishment had insufficient buffering between it and the adjacent residential area to protect residents from negative effects of an increase in noise, light, and traffic nuisances; (3) that the proposed use would not meet the City's Comprehensive Plan which seeks to prevent the encroachment of

incompatible commercial uses; and (4) that two prior CUP applications were denied and conditions in the neighborhood had not changed significantly to support approving the request.

7. The Planning Commission and City Council's reasoning further dissuades the Court when the Court considers that Toby's casino was granted a CUP on property very similarly situated to Petitioners'.

8. The Court also notes that in Petitioners' application for a CUP on or about December 9, 2005, the Staff Report recommended approval of the CUP; however, the Court is unaware of any conditions in the neighborhood that changed significantly between the 2005 Staff Report and the 2011 Staff Report.

9. Petitioners' proposed location of the building and Petitioners' offer to screen the property in any manner requested by the City Council would sufficiently buffer the property.

10. Petitioners' application meets the applicable criteria for issuance of a conditional use permit. The language of the ordinance 17.50.185 is mandatory, and it specifically states that a CUP "must" be issued in the event these elements are satisfied. Nonetheless, the Rapid City Common Council denied the Application for the Conditional Use Permit.

11. This denial of Petitioners' Application for a Conditional Use Permit to operate an on-sale liquor establishment with video lottery was arbitrary and capricious.

12. To the extent any of these Conclusions of Law are Findings of Fact, they are re-designated as such.

WHEREFORE, IT IS HEREBY ISSUED that the Petitioners' Application for a Writ of Mandamus compelling Rapid City to approve Petitioners' Application for a Conditional Use Permit is hereby GRANTED.

Dated this 7th day of January, 2014
BY THE COURT



Honorable Wally Eklund, Circuit Judge

ATTEST

Ranae Truman, Clerk of Court

By: _____

Deputy

(seal)