



STATE OF INDIANA)
) SS:
COUNTY OF ALLEN)

MARTIN QUINTANA,)
 Petitioner,)

vs.)

FORT WAYNE PLAN)
COMMISSION,)
 Respondent.)

ALLEN SUPERIOR COURT
CAUSE NO. 02D02-2212-PL-414

**ORDER REGARDING VERIFIED
PETITION FOR JUDICIAL REVIEW**

INTRODUCTION

On April 18, 2024, Petitioner Martin Quintana (“Quintana”) appeared by attorney Jason Kuchmay (attorney James Federoff observed via video conference), and Respondent Fort Wayne Plan Commission (“the Plan Commission”) appeared by attorneys Robert Eherenman and Hannah Alderks for hearing pursuant to Quintana’s Verified Petition for Judicial Review (filed December 13, 2022), the Court’s Order for Remand (entered September 21, 2023), the Plan Commission’s Submission of Supplemental Board Record (filed February 9, 2024), Quintana’s Supplemental Brief (filed March 4, 2024), the Plan Commission’s Supplemental Response (filed March 22, 2024), and Quintana’s Supplemental Reply (filed April 10, 2024). Following argument of counsel, the Court took this case under advisement. The Court concludes that it has jurisdiction over the parties and the subject matter of this case. Following the receipt of further limited briefing by the parties, the Court now concludes and Orders as follows.

FINDINGS OF FACT

In 2019, Quintana sought zoning approvals from the Fort Wayne Plan Commission ("Plan Commission") and the Fort Wayne Common Council ("Common Council") for his commercial development, which required a rezoning from R1/Single Family to C2/Limited Commercial. During the 2019 zoning proceedings, to avoid the remonstrance of the nearby Covington Creek Association ("the Association"), Quintana agreed to zoning restrictions that would limit his development. These zoning restrictions were contained in a Written Commitment, which could be enforced by the Association through private covenants. The restrictions in the Written Commitment were also integral to Quintana's receipt of the Plan Commission's approval. With the Written Commitment, Quintana received his 2019 zoning approvals.

The Written Commitment restricted certain uses at the commercial development that were otherwise permitted in a C2 zoning district. Section 1.1 of the Written Commitment prohibits "restaurants, including fast food style restaurants (except as described in Section 1.2.1)." Section 1.2.1 of the Written Commitment articulated the following limited exemption:

A sandwich bar-style restaurant whose primary business is to sell "made-to-order" or "subway-style" sandwiches (which by way of example includes, but is not limited to, "Subway" or "Jimmy John's", but expressly excludes traditional fast food restaurants such as "McDonalds", "Arbys" and "Wendys"), provided that any such restaurant shall not have outdoor seating or drive-through service. For the avoidance of doubt, the sale of alcoholic beverages is expressly prohibited upon the Real Estate.

In 2022, Quintana planned to allow a "Famous Taco" restaurant to occupy one of the tenant spaces within the commercial development. The

Association contacted Quintana and opined that the Famous Taco restaurant somehow ran afoul of the Written Commitment. To avoid any uncertainty, Quintana then filed an application with the Plan Commission, whose approval of the Amendment was required, seeking to modify the above-quoted Written Commitment to allow for the Famous Taco restaurant at the commercial development. After negotiations, the Association agreed to an amendment of the 2019 Written Commitment. The final proposed Amendment to the Written Commitment ("the Amendment") added a new provision, Section 1.2.3, which stated that the "Owner may operate a Famous Taco on the Real Estate" subject to the conditions originally set out in Section 1.2.1 regarding no outdoor seating, no drive-through, and no alcohol sales, and additional provisions restricting the hours of operation and prohibiting outdoor speakers playing music or radio. Recital F of the Amendment clarified that Quintana desired to operate a "Mexican restaurant called 'Famous Taco', which will serve made-to-order tacos, burritos, and other Mexican-style food items." Recital G curiously expressed Quintana and the Association's agreement that a Famous Taco restaurant was not "clearly permit[ted]" under the terms of the original Written Commitment.

On October 10, 2022, the Plan Commission held a public hearing regarding the Amendment, as required by Indiana Code § 36-7-4-1015(b)(5). At the October 10, 2022 public hearing Quintana, by counsel, made his presentation to the Plan Commission, which included the following relevant statements:

[T]his is a pretty limited request in scope with the original approval of the primary development plan and rezoning. A written commitment was entered into restricting certain uses and one of them was the type of restaurant.

And it kind of became an argument of . . . is a taco a sandwich or not. So, we thought easier to agree that it fits within the character and scope of what we had anticipated. And so, we have an amendment. We have an amendment to the written commitment that is signed by both the developer and the condominium association president because . . . they were made a party to the covenants via an enforcement action.

So, in order to amend them, both the parties need to sign, and we need your stamp of approval. So, this basically clarifies that the Famous Taco would be permitted at this location.

Quintana agreed that the Amendment would only allow this Famous Taco restaurant, and the Written Commitment would need to be amended again if a different restaurant were to take its place in the future.

The Plan Commission held a business meeting on October 17, 2022, in which they discussed Quintana's proposed Amendment. The Plan Commission members could not reach a dispositive vote at this meeting and deferred the Amendment to the following month. On November 14, 2022, the Plan Commission held another business meeting and once again discussed the Amendment. In the ensuing discussion, one Plan Commission member referenced the Allen County development comprehensive plan ("Comprehensive Plan"), and stated:

The basis on which we make this kind of decision is that . . . is it in conformance with the [Comprehensive Plan], which I have looked at mine and the very first land use goal starts out saying encourage carefully planned growth. This project has not been

carefully planned from the word go. . . . [I]t's not planning anymore. It's not using the zoning ordinance to guide and . . . to set the path for what we do. It's always being in a . . . reactive mode.

Another Plan Commission member echoed that sentiment, stating “[t]his particular development, we’re continuing to react instead of being a part of the planning process.” A third Plan Commission member expressed some reservation that the Plan Commission might do “harm at the end by not allowing it to be as successful as possible because we didn’t like the way that the fellow ran his initial request.” It was also expressed that the Plan Commission’s role is to consider general uses rather than business plans. Finally, one member believed the original Written Commitment was a “good compromise” after the shell of the building was already built without proper permits, and “why couldn’t [Quintana] have lived with that?”

After substantial discussion, the Plan Commission voted to deny the Amendment to the Written Commitment and issued written “Findings of Fact,” which consisted of two sentences summarily denying the Amendment. Quintana filed his Verified Petition for Judicial Review on December 13, 2022. The Court ultimately entered an Order for Remand on September 21, 2023, which ordered the Plan Commission to remedy its insufficient findings.

On October 16, 2023, the Plan Commission held a business meeting in which they voted to pass a motion to have staff review the record and prepare new findings of fact. On November 20, 2023, the Plan Commission voted to approve the new findings, which were then submitted to the Court

on November 27, 2023. The Plan Commission's new findings noted three distinct bases for its denial of the Amendment of the Written Commitment:

As explained below, at the October 10, 2022 public hearing, the applicant failed to prove to the Plan Commission that the proposed amendment to the recorded Written Commitment:

- was consistent with the Plan Commission's prior 2019 zoning approval;
- was consistent with the Comprehensive Plan; and
- was based on a change in the conditions of the property from the time the Written Commitment was approved by the Plan Commission and Common Council.

Expanding upon these bases, the Plan Commission specifically disagreed with Quintana's contention "that the proposed restaurant brand is consistent with the recorded Written Commitment." The Plan Commission stated:

The applicant did not present this type of restaurant brand as an exception to the applicant's ban of all restaurants from the shopping center. The Common Council did not consider this brand of restaurant when rezoning the property. In rezoning the property, both the Plan Commission and the Common Council relied on the terms of the written commitment presented by the applicant when the applicant admitted that he built the commercial shopping center in a residential district without proper permits. The applicant failed to explain why this restaurant brand was not included in the 2019 written commitment.

Regarding the Comprehensive Plan and local zoning ordinance, the Plan Commission found:

The Plan Commission stated in public meetings its concerns regarding the zoning history of the Quintana Plaza project. The 2019 Written Commitment was provided as a compromise with the Plan Commission and adjacent neighborhood association after a 9,000 square foot commercial addition was constructed under a residential permit without going through the proper

approval channels, including rezoning of the property. The request to now change that commitment does not follow good planning policy and does not support positive growth and development, as established by the Comprehensive Plan.

The Plan Commission does not approve specific business plans. The proposed amendment seeks to allow only a specific restaurant brand, and the zoning ordinance does not regulate specific brands but only regulates general uses.

Finally, regarding changing circumstances, the Plan Commission stated:

When the Plan Commission approves a Written Commitment based on a certain set of circumstances presented at a public hearing, and the Common Council rezones the land based on the Plan Commission's Written Commitment, a substantial change in circumstances should be shown to support a proposed amendment to a written commitment. The applicant failed to show the Plan Commission why the recorded Written Commitment should be amended from the terms the applicant originally presented to the Plan Commission and Common Council in 2019.

DISCUSSION and DECISION

Quintana now seeks judicial review of the Plan Commission's denial of his proposed Amendment to the zoning restrictions in the Written Commitment. In a judicial review, "the burden of demonstrating the invalidity of a zoning decision is on the party to the judicial review proceeding asserting invalidity." I.C. § 36-7-4-1614(a). The Court shall set aside a zoning decision only if the Court determines that the person seeking judicial relief has been prejudiced by a zoning decision that is:

- (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (2) contrary to constitutional right, power, privilege, or immunity;

- (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (4) without observance of procedure required by law; or
- (5) unsupported by substantial evidence

I.C. § 36-7-4-1614(d). As the presumed expert in local land use, the decisions of a plan commission are presumed to be correct, and should not be overturned unless the petitioner overcomes this presumption. See *Cundiff v. Schmitt Dev. Co.*, 649 N.E.2d 1063, 1066 (Ind. Ct. App. 1995). “If the commission’s decision is correct on any of the grounds stated for disapproval, its decision should be sustained.” *Id.* A reviewing court may not try the cause de novo or substitute its judgment for that of the board.” I.C. § 36-7-4-1611.

With regard to commitments, I.C. § 36-7-4-1015(b)(5) states that, following a public hearing, “a commitment may be modified or terminated: (A) by a decision of the plan commission . . . to which the commitment was made.” (emphasis added). Here, once Quintana and the Association decided that an Amendment to the Written Commitment was the path forward, the approval of the Plan Commission was required. The Plan Commission then had substantial discretion—within the bounds of I.C. § 36-7-4-1614(d)—to approve or deny the Amendment based on the evidence, or lack thereof, that it received at the October 10, 2022 public hearing.

Given its standard of review, the Court concludes that the Plan Commission’s denial of the Amendment to the Written Commitment was permissible. Pursuant to the Comprehensive Plan, the Plan Commission found that the proposed Amendment did not follow good planning policy and did not support

positive growth and development. The Plan Commission did not abuse its discretion by considering how the goals and policies of the Comprehensive Plan applied to the Written Commitment and subsequent Amendment. Moreover, in the face of significant planning and procedural concerns expressed by the Plan Commission at the October 10, 2022 public hearing, Quintana produced no evidence as to why the Amendment followed good planning policy. At the October 10, 2022 public hearing, Quintana did not appeal to the discretion of the Plan Commission, but simply asserted that the Amendment was agreed to by the Association, and now “we need [the Plan Commission’s] stamp of approval.”

Additionally, the Plan Commission properly found that it approves general uses, not specific business plans, and the proposed Amendment sought to allow only a specific restaurant brand—a Famous Taco. This finding is supported by the October 10, 2022 public hearing record in which Quintana’s counsel acknowledged that the Amendment is limited to the specific Famous Taco restaurant brand. This is also clear from the language of the Amendment, which added Section 1.2.3 to the Written Commitment to state: “Notwithstanding the provisions in Section 1.2.1, Owner may operate a Famous Taco on the Real Estate.” While the plain language of the original Written Commitment permits a general use (with illustrative examples), the plain language of Section 1.2.3 of the Amendment would permit one specific brand of restaurant. Quintana points to Recital F and argues that the intent of the Amendment was to clarify that Mexican-style food could be served at a made-to-order restaurant. This may well be accurate. However, the legally operative provisions of the Amendment leave no doubt that a specific business, rather than a general use, was the subject of the Amendment. For

these reasons, the Plan Commission did not engage in reversible action outlined in I.C. § 36-7-4-1614(d) when it considered its function and denied the Amendment because “the Plan Commission does not approve specific business plans.”

The Court concludes that there are proper grounds on which the Plan Commission based its decision to deny the Amendment to the Written Commitment. The Court therefore declines to grant Quintana relief from the Plan Commission decision under I.C. § 36-7-4-1615.

Notwithstanding the above conclusion, the Court concludes that a Famous Taco brand restaurant may properly operate on the premises under the terms of the original Written Commitment. In other words, the Amendment, while certainly courteous, was not necessary. The proposed Famous Taco restaurant falls within the scope of the general use approved in the original Written Commitment. The proposed Famous Taco restaurant would serve made-to-order tacos, burritos, and other Mexican-style food, and would not have outdoor seating, drive-through service, or serve alcohol. The Court agrees with Quintana that tacos and burritos are Mexican-style sandwiches, and the original Written Commitment does not restrict potential restaurants to only American cuisine-style sandwiches. The original Written Commitment would also permit a restaurant that serves made-to-order Greek gyros, Indian naan wraps, or Vietnamese banh mi if these restaurants complied with the other enumerated conditions. Here, a Famous Taco restaurant is encompassed by the terms of the original Written Commitment, and no Amendment was necessary.

CONCLUSION

The Court has examined the filings of the parties, the record, the applicable law, and the arguments of counsel. The Court concludes that the Respondent Fort Wayne Plan Commission's denial of the Amendment to the Written Commitment was not improper; however, a Famous Taco restaurant is permissible under the terms of the original Written Commitment. This is a final, appealable order. Costs to Petitioner.

May 13, 2024



JUDGE CRAIG J. BOBAY