

0/A 5-6-86

IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,092

STEPHEN B. IRVINE

Petitioner

v.

DUVAL COUNTY PLANNING COMMISSION
and the CITY OF JACKSONVILLE

Respondents

* * * *

RESPONDENTS' ANSWER BRIEF ON THE MERITS

* * * *

GERALD A. SCHNEIDER
GENERAL COUNSEL

ROBERT G. ALEXANDER
ASSISTANT COUNSEL
1300 City Hall
Jacksonville, FL 32202

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STATEMENT OF FACTS

Respondent generally agrees with Petitioner's Statement of Facts but specifically adopts the facts as stated by the lower court. Irvine v. Duval County Planning Commission and the City of Jacksonville, 466 So.2d 357 (Fla. 1st DCA 1985). Additionally, Respondent adopts by reference, including pagination, Petitioner's Appendix.

SUMMARY OF ARGUMENT

Due process and burden of proof standards have been met. The essential requirements of law have been served. No rules, ordinances or other regulations and laws are cited as having been violated.

ISSUE I

WHETHER THE PROCESSES OF THE ZONING AUTHORITY
IN THIS CASE AFFORDED THE PETITIONER
DUE PROCESS OF LAW?

ISSUE II

WHETHER THE CORRECT LAW HAS BEEN APPLIED IN THE FINDING
THAT THE PETITIONER DID NOT MAKE A SHOWING
SUFFICIENT TO MEET HIS BURDEN?

Respondent will treat the two issues concurrently.

Petitioner does not cite any rule, regulation, ordinance or law of any sort as having been violated. With this in mind, it is suggested that the controlling rule is that the "burden of proof, apart from statute, is upon the party asserting the affirmative tribunal." Florida Department of Transportation v. J.W.C. Company, Inc. 396 So.2d 778, 788 (Fla. 1st DCA 1981); Irvine, supra at page 360. Additionally, there are Florida cases holding that the burden of proof may be placed on the applicant for the exception. Plyant v. Orange County, 328 So.2d 199 (Fla. 1976); Board of County Commissioners v. First Free Will Baptist Church, 374 So.2d 1055 (Fla. 3d DCA 1979).

It is without dispute that the only "evidence" submitted by the Petitioner was that, paraphrased, he spoke in favor of his exception, that the shop had been there 40 years, and that similar businesses had operated there. Noting this, the First District Opinion held:

Again turning to Yokley's treatise on zoning law, we find the following:

In the matter of granting exceptions it must be remembered that there must be a statutory authorization and that the same care should be exercised by the Board as when granting a variance. The Board must find as a fact that the exception will subserve the public welfare

and not the needs of some private individual. The scheme of any ordinance authorizing exceptions requires two different kinds of findings by the Board: First, as to the interests of the general public, and second, as to the interest of a particular neighborhood. Where these two elements are lacking an exception may not properly be granted.

Volume 2, Yokley, Zoning Law and Practice (Third Edition), §15-1, pp. 123, 124. It is obvious that the reasons advanced by the petitioner touch upon matters personal to the petitioner only, and do not relate in any manner to the interests of the general public, nor to the particular neighborhood. See generally, 82 Am. Jur. 2d, Zoning and Planning, §285. That an exception for the operation of a similar business at that location had been granted on several occasions in the past would be a circumstance to be considered by the Commission, but on the limited record made by the petitioner both before the Commission and the trial court, we cannot say that the Commission's denial of yet another special exception constituted an abuse of its discretion such as to mandate the granting of petitioner's request.

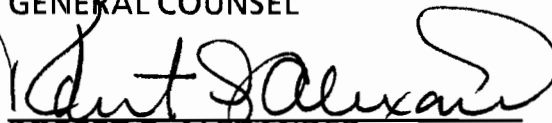
Irvine, *supra* at page 361.

CONCLUSION

The Petitioner has "not, demonstrated that the circuit departed from the essential requirements of law", Irvine, at page 362 nor that the First District Opinion inappropriately applied the law of the State of Florida.

Respectfully submitted,

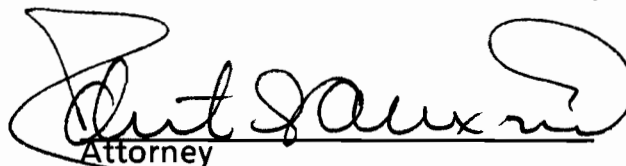
GERALD A. SCHNEIDER
GENERAL COUNSEL



ROBERT G. ALEXANDER
ASSISTANT COUNSEL
1300 CITY HALL
JACKSONVILLE, FLORIDA 32202
(904) 633-2460
Attorney for Respondents.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Barry A. Bobek, Esq. 503 East Monroe Street, Jacksonville, Florida 32202 and Stephen A. Hould, Esq., 220 East Forsyth Street, Jacksonville, Florida 32202, by U. S. Mail, this 6th day of March, 1986.



Attorney