

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

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| ZISS BROS. CONSTRUCTION CO., |) | CASE NO. CV 06 595230 |
| INC. |) | |
| Plaintiff |) | JUDGE JOHN P. O'DONNELL |
| |) | |
| -vs- |) | <u>JOURNAL ENTRY</u> |
| |) | <u>AND ORDER</u> |
| CITY OF INDEPENDENCE PLANNING |) | |
| COMMISSION, <i>et al</i> , |) | |
| |) | |
| Defendants |) | |

John P. O'Donnell, J.:

On November 29, 2005, Ziss Brothers Construction Company, Inc., submitted an application to the City of Independence Planning Commission for approval of a preliminary plan. The preliminary plan was for a proposed subdivision development named Oak Knoll. The proposed subdivision would be comprised of ten single-family homes on Stone Road east of Brecksville Road in Independence.

The Independence City Charter at Article IV, Section 5, creates the planning commission for, among other reasons, "the approval of plats for the subdivision of land."

Statutes governing the planning commission procedures and establishing the limits of its authority are set forth at Part XI of the Codified Ordinances of the City of Independence. Those statutes include the following provisions relevant to this case:

1105.02 PURPOSE AND INTENT.

The purpose of the Land Planning and Subdivision Code and the intent of Council in its adoption, is to guide and control the planning, subdividing and development of land and to provide procedures for the administration thereof in order to promote and protect the public health, safety, convenience, comfort, prosperity and general welfare of the City . .

* * *

1107.13 MAPS, PLANS AND PLATS.

* * *

(j) "Preliminary plan" means a drawing prepared by a developer for the purpose of study of a major subdivision of land, or a preliminary plan of land and buildings of a development area which, when approved by the designated authority, permits proceeding with the preparation of the final plat of a subdivision or final plan of a development area.

* * *

1109.04 MAJOR SUBDIVISION; PRELIMINARY PLAN.

(b) Application. . . . The purposes of the preliminary plan are to explore the best subdivision design and its relationship to the natural features of the development area and adjoining developments or vacant land, to outline a program of land improvements and obtain the suggestions and recommendations of the Commission before a firm plan is prepared.

(c) Planning Commission Action.

* * *

(2) The Commission shall notify the owners, as shown upon the current records of the County Recorder, of adjoining unsubdivided land and owners of adjoining lots if a street connection is involved of the time and place of a public hearing.

(3) . . . If the Commission, after an evaluation of the preliminary plan and reports of the Planning Consultant and Engineer, approves the preliminary plan, the Chairman and Secretary . . . shall recommend the plan to Council for its approval.

(4) If the Commission or Council fails to approve the preliminary plan, it shall state in its records the reason or reasons for such disapproval.

These statutes make it clear that the planning commission's action on a preliminary plan is not simply ministerial. The commission has discretion to decide whether a preliminary plan will serve the "general welfare" and to then approve, or disapprove, the plan accordingly.

The preliminary plan for the Oak Knoll Development was a subject of discussion during at least seven planning commission meetings from December 6, 2005, until June 6, 2006. It is not necessary to summarize here all of the information provided to the commission over the course of those meetings. It is sufficient to note that nearby residents and others who opposed the plan were allowed to express the basis for their objections to the development and that the applicant was given opportunity to present evidence to support its proposal and to allay the concerns of those who objected.

After a long discussion of the merits of the development at the June 6, 2006, meeting, a vote was taken and the planning commission declined to approve the preliminary plan, with no members voting in favor of approval. The meeting minutes show that each of the voting members articulated reasons why they could not vote to approve the preliminary plan.

The developer appealed that decision to this Court pursuant to Ohio Revised Code §2506.01 *et seq.*

This court's standard of review of the commission's decision is set forth as follows in O.R.C. §2506.04:

If an appeal is taken in relation to a final order, . . . the court may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from with instructions to enter an order, adjudication, or decision consistent with the findings or opinion of the court.

An administrative agency's decision is presumed valid. See, e.g., *C. Miller Chevrolet v. Willoughby Hills* (1974), 38 Ohio St.2d 298, para. 2 of syllabus. The standard of review applied by a trial court in an administrative appeal is whether the decision of the administrative entity is supported by a preponderance of reliable, probative and substantial evidence in the record to support the administrative agency's decision. *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34. The Court of Common Pleas may not substitute its judgment for that of the agency. *Dudukovich v. Lorain Metro. Housing Auth.* (1979), 58 Ohio St.2d 202, 207.

The thrust of the appellant's arguments to this court is that the planning commission's denial of preliminary plan approval was not supported by direct evidence provided by opponents of the development. However, this argument ignores the burden of proof at the administrative level.

The burden of proof was on the appellant to persuade the planning commission that its development would conform to the criteria set forth in Section 1111 of the Independence Code, *i.e.* that it would "promote and protect the public health, safety, convenience, comfort, prosperity and general welfare." Because the appellant had the burden of proof, the planning commission could have properly declined preliminary plan approval even in the absence of opposing evidence. Moreover, the fact of vehement opposition alone – regardless of its evidentiary quality - tends to suggest the development did not promote the general welfare and the commission did not abuse its discretion by taking into account the existence of objections to the development.

Considered in the context of the developer's burden of proof, this court finds that the planning commission's implicit conclusion – that the proposed subdivision would not promote the public health, safety, convenience, comfort, prosperity and general welfare –

is not unreasonable and is supported by the preponderance of substantial, reliable and probative evidence on the whole record. The court also finds that the decision to deny approval of the preliminary plan was not unconstitutional, illegal, arbitrary or capricious and therefore the decision of the planning commission is affirmed.

IT IS SO ORDERED.

JOHN P. O'DONNELL, JUDGE

CERTIFICATE OF SERVICE

A copy of the foregoing Journal Entry and Order was sent by regular U.S. mail
this _____ day of January, 2008, to the following:

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