

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CAPTAIN BUFFALO FOODS, et al.)	CASE NO: CV 08 659367
)	
Appellants)	JUDGE JOHN P. O'DONNELL
)	
vs)	
)	
CITY OF CLEVELAND, et al.)	<u>JOURNAL ENTRY</u>
)	
Appellees)	

Appellant John E. Barnes, Jr. is the owner of a building at 3902 Lee Road in Cleveland. On February 7, 2007, he applied for a building permit through the City of Cleveland's Building and Housing Department. Although the application is not in evidence, the substance of it was a request by Barnes to add two floors to the existing one-story building.¹

The application was denied on April 16, 2007, and Barnes appealed this decision to the Board of Zoning Appeals ("BZA"). After a hearing, the BZA denied the appeal by resolution of November 5, 2007.² Barnes then appealed the BZA's decision to the Common Pleas Court as Case No. 643426.

Meanwhile, Barnes, on November 30, 2007, filed a second application for a building permit on the same property. Although this application is also not part of the record here, there appears to be no dispute that it was essentially the same as the first application, except that it did not include a proposal to add a third story to the building. That application was denied for the same reasons as the first and Barnes again appealed to the BZA.

¹ See Exhibit A to Appellees' Merit Brief, 4/16/07, Notice of Non-Conformance.

² See Exhibit B to Appellees' Merit Brief.

On April 14, 2008, the BZA decided no hearing was necessary and dismissed the appeal on the basis of *res judicata* in that the denial of a substantially similar variance had already been upheld by the BZA in connection with the first building permit application. The appellants then filed this appeal.

Section 2506.01 of the Ohio Revised Code provides that this court may review the BZA's April 14, 2008, order denying the second appeal. Pursuant to O.R.C. § 2506.04, this court may find that the BZA's decision was correct or that it was unconstitutional, illegal, arbitrary, capricious, unreasonable or unsupported by the evidence. Depending on the finding, this court may then affirm, reverse, vacate or modify the order.

The Rules and Regulations of the Board of Zoning Appeals³ provide, at Section XIII, as follows:

XIII. REFILING OF APPEAL FOR VARIANCE PREVIOUSLY DENIED OR FOR MODIFICATION/ENLARGEMENT OF EXISTING VARIANCE.

The filing of an appeal for a variance that is identical or substantially similar to a previously filed appeal that was denied covering the same property, shall be dismissed by the Board as *res judicata* unless the Board finds that appellant has satisfactorily demonstrated changed circumstances, or that substantial new evidence exists and will be presented to the Board that was not available at the hearing on the prior appeal, or that another basis applies that would prevent the application of *res judicata*.

Upon notice to appellant by the Secretary that an appeal is deemed identical or substantially similar to a prior appeal, appellant shall file within seven (7) days of notice or from the date of filing an appeal for the modification or enlargement of an existing variance, an affidavit and any other supporting documentation demonstrating the change in circumstance or the substantial new evidence to be presented to the Board that was not available at the hearing on the prior appeal, or any other basis which would prevent the application of *res judicata*.

³ Exhibit I to Appellees' transcript.

The Board may dismiss the appeal if appellant fails to file an affidavit or if the appellant's affidavit and any other supporting documentation submitted fail to demonstrate good grounds for hearing the appeal.

Any notice required shall be deemed made as of the date of mailing by the Secretary.

The BZA is not prohibited from enacting and enforcing this rule. The Ohio Supreme Court, in *Grava v. Parkman Twp.* (1995), 73 Ohio St. 3d, 379, has held that a second application for a zoning variance may be barred by the doctrine of *res judicata*.

The court therefore finds that the April 14, 2008, decision of the Board of Zoning Appeals was not unconstitutional, illegal, arbitrary, capricious, unreasonable or unsupported by the evidence; hence, that decision is hereby affirmed.

IT IS SO ORDERED:

Judge John P. O'Donnell

Date: _____

SERVICE

A copy of this Journal Entry was sent by regular U.S. mail, this ____ day of February, 2009, to the following:

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Judge John P. O'Donnell