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**IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

**FILED**

NANCY C. SCHUSTER  
Plaintiff

Case No: CV-15-844606

2016 APR -5 A 11:44

Judge: MICHAEL E JACKSON CLERK OF COURTS  
CUYAHOGA COUNTY

CITY OF CLEVELAND, OHIO, ET AL  
Defendant

**JOURNAL ENTRY**

98 DISPOSED - FINAL

DECISION REVERSING AND REMANDING THE DECISION OF THE CITY OF CLEVELAND BOARD OF ZONING APPEALS. O.S.J.

COURT COST ASSESSED TO THE DEFENDANT(S).  
PURSUANT TO CIV.R. 58(B), THE CLERK OF COURTS IS DIRECTED TO SERVE THIS JUDGMENT IN A MANNER PRESCRIBED BY CIV.R. 5(B). THE CLERK MUST INDICATE ON THE DOCKET THE NAMES AND ADDRESSES OF ALL PARTIES, THE METHOD OF SERVICE, AND THE COSTS ASSOCIATED WITH THIS SERVICE.

*Michael E Jackson* 4/4/16  
\_\_\_\_\_  
Judge Signature Date

COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

BARBARA BELOVICH, ET AL.	)	Case No. CV 15-843258(Consolidated with
	)	Case No. CV 15-844606
APPELLANTS,	)	
	)	JUDGE MICHAEL E. JACKSON
v.	)	
	)	<b>JOURNAL ENTRY AND OPINION</b>
	)	<b>REVERSING AND REMANDING THE</b>
CITY OF CLEVELAND, OHIO	)	<b>DECISION OF CITY OF CLEVELAND</b>
	)	<b>BOARD OF ZONING APPEALS</b>
APPELLEE.	)	

This is a consolidated case. Appellants Barbara Belovich, Jacob Kronberg, and Nancy C. Schuster (collectively, Appellants or Neighbors) appeal the decision of the City of Cleveland Board of Zoning Appeals (Zoning Board) that granted two variances to Intervenor-Appellees, The Storer Meat Co., Inc., and 3007 Clinton Avenue LLC., (collectively, Storer/Clinton). For the reasons stated in this Journal Entry and Opinion, the Court reverses and remands the Zoning Board's decision for further proceedings consistent with this order.

Storer/Clinton applied to the Zoning Board to obtain an area variance and a rear setback variance in order to build a four-story 67 unit apartment building with a 70 car underground garage at 3007 Clinton Avenue in Cleveland, Ohio, in an area known as Ohio City. Presently, Storer/Clinton owns and operates a warehouse on the site; formerly it was a sausage-making plant. This property is zoned for Residential – Industrial Use<sup>1</sup>. Residential properties, including those owned by the Neighbors<sup>2</sup>, are adjacent to and across the street from this warehouse.

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<sup>1</sup> On or about September 30, 2015, and effective 30 days thereafter, the City of Cleveland, passed Ordinance number 981-15, which no longer requires the previously granted variances. The property was rezoned to a "Multi-Family District and an "F Area District." As such, this 67 unit apartment building development may proceed without the variance. Thereafter, the city of Cleveland approved the site plan of Storer/Clinton on or about November 3, 2015. This enables Storer/Clinton to obtain a building permit.

<sup>2</sup> Nancy C. Schuster operates a law office on her residential property.

Storer/Clinton applied to the Zoning Board seeking two variances to construct this apartment building. The first variance would permit Storer/Clinton to build a 72, 250 gross square footage building on a property with a permitted zoning allowance for a building that is 41,160 square feet. This proposed building is 1.7 times or about 70% larger than permitted under the applicable zoning regulations. The second variance would permit the building to be built with an approximate setback of 23 feet from the rear of the property line, instead of the zoning requirement of 29 feet from the rear of the property line.

The Building and Housing Department originally denied Storer/Clinton's application for the variances, but the Zoning Board reversed the decision and granted the application subject to the Cleveland Codified Ordinances. The Zoning Board granted these variances by a three to one vote, as stated in its resolution adopted on March 23, 2015. The Zoning Board issued the resolution after a hearing where these parties asserted their positions on the record. The resolution states:

WHEREAS, with due consideration given to the testimony and other evidence submitted at the hearings, the Zoning Board finds that the appeal should be granted for the following reasons:

1. Evidence was submitted that showed the Board of Zoning Appeals had granted similar area variances on several townhouse projects on the same block of Clinton Avenue.
2. Testimony was given that the current use as a meatpacking facility creates heavy traffic in and through the residential neighborhood.
3. Testimony was given that the proposed rear yard variance is a minor issue, as the new building will have a larger rear yard than the existing manufacturing building.
4. Landmarks Commission issued a Certificate of Appropriateness for the demolition of the manufacturing building and the design of the 67 unit apartment building; the Commission found that the proposal will not adversely affect any significant historical or aesthetic feature of the property and that it is appropriate and consistent with the spirit of the Landmarks Commission Chapter of the City of Cleveland Codified Ordinances.

5. Councilman Joe Cimperman and Ohio City Inc. support granting the variance. Also, a letter of support from the Franklin Clinton Block Club was submitted that stated several community meetings were held bringing together the neighbors and the development team resulting in modifications to the initial design.
6. Granting the appeal will not be contrary to the intent and purpose of zoning code.
7. Refusal of this appeal could deprive the owner of substantial property rights; now, therefore,

BE IT RESOLVED that the decision of the Building and Housing Department is reversed and the appeal is granted subject to the Cleveland Codified Ordinances.

Thereafter, the Neighbors filed an administrative appeal to this Court pursuant to R.C. 2506.01.<sup>3</sup>

The Cleveland Codified Ordinance (CCO) at issue in this case is section 329.03(b). This section grants to the Zoning Board the authority to permit a variance in specific cases where the following conditions are established:

- (1) The practical difficulty or unnecessary hardship is peculiar to the premises sought to be built upon or used because of physical size, shape, or other characteristics of the premises \*\*\*which differentiate it from other premises in the same district and create a difficulty or hardship caused by a strict application of the provisions of this Zoning Code not generally shared by other land or buildings in the same district;
- (2) Refusal of the variance appealed for will deprive the owner of substantial property rights; and
- (3) Granting of the variance appealed for will not be contrary to the purpose and intent of this Zoning Code.

Cleveland Codified Ordinances 329.03(b).

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<sup>3</sup> The Zoning Board did not make a finding that the Neighbors had standing; and Storer/Clinton did not raise any issues of standing of the Neighbors to object to this request for the variances at the Zoning Board hearing or regarding this appeal. The Court has reviewed the record, and finds that the Neighbors have standing to assert their objections at the Zoning Board hearing and to appeal the Zoning Board's decision to grant the variances.

The burden to prove these three conditions is on Storer/Clinton, as the party seeking the variance, and if it fails to establish all three conditions, the Zoning Board must deny the variances. *Kurtock v. Cleveland Bd. Of Zoning Appeals*, 2014-Ohio-1836, ¶16 (8th Dist.), citing *Consol. Mgt. Inc. v. Cleveland*, 6 Ohio St.3d 238, 242, 452 N.E.2d 1287 (1983); *Cleveland v. Patrick Realty*, 8th Dist. Cuyahoga No. 90349, 2008-Ohio-4243, ¶ 24. The Zoning Board is required to "make a finding on each of the three conditions as they apply in each specific case as a prerequisite for the granting the variance." *Kurtock*, at ¶ 16, citing CCO 329.03 (c); *Zurow v. Cleveland*, 61 Ohio App.2d 14, 20, 399 N.E.2d 92 (8th Dist. 1978).

This Court has the authority in this type of an appeal to "find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of the substantial, reliable, and probative evidence on the whole record." R. C. 2506.04.

The Court and the parties agree that the standard to be applied in part (1) of this ordinance is that of "practical difficulty," and not the standard of "unnecessary hardship." *Kisil v. City of Sandusky* (1983) 12 Ohio St.3d 30; *Duncan v. Middlefield*, 23 Ohio St.3d 83, 491 N.E.2d 692 (1986). "Practical difficulty" exists whenever a landowner establishes that the zoning requirement unreasonably deprives an owner of a permitted use of the property. *Duncan*, at 86.

As stated by the Supreme Court of Ohio, all of these sections of the COO require an administrative agency and reviewing courts to apply properly certain factors to evaluate zoning decisions. *Id.* "The factors to be considered and weighed in determining whether a property owner seeking an area variance has encountered practical difficulties in the use of his property include, but are not limited to:

- (1) whether the property in question will yield a reasonable return or whether there can be any beneficial use of the property without the variance;

- (2) whether the variance is substantial;
- (3) whether the essential character of the neighborhood would be substantially altered or whether adjoining properties would suffer a substantial detriment as a result of the variance;
- (4) whether the variance would adversely affect the delivery of governmental services (e.g. water, sewer, garbage);
- (5) whether the property owner purchased the property with knowledge of the zoning restriction;
- (6) whether the property owner's predicament feasibly can be obviated through some method other than a variance; and
- (7) whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting the variance." *Duncan*, at 86, citing e.g. 3 Anderson, American Law of Zoning (2 Ed. 1977), Variances, section 18.47 et seq.; *Wachsberger v. Michalis*, 19 Misc.2d 909, 191 N.Y.S.2d 621 (Sup.Ct.1959).

After analyzing the Zoning Board's resolution approving Storer/Clinton's application for the variances in relation to the three 329.03(b) requirements, it is clear that the Zoning Board only addressed sub-parts (2) and (3) of 329.03(b). The Neighbors concede that the Zoning Board addressed these two specific findings<sup>4</sup>, but they dispute the factual basis for such findings and argue whether the Zoning Board's findings are "unsupported by the preponderance of the substantial, reliable, and probative evidence on the whole record" as required by R.C. 2506.04. Of these two sub-parts, this Court determines that only sub-part (3) is satisfied as demonstrated by the Zoning Board's finding in section 6 of the resolution.

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<sup>4</sup> However, the Neighbors did not point out the finding in the resolution that states the owner could be deprived of substantial property rights, compared to the Ordinance which requires the owner will be deprived of such rights.

The Zoning Board failed to make findings necessary to satisfy sub-part (2) of 329.03(b). In section 7 of the resolution, the Zoning Board stated, with the Court's emphasis added, "Refusal of this appeal could deprive the owner of substantial property rights." However, sub-part (2) of 329.03(b) requires the Zoning Board to find that "Refusal of the variance appealed for will deprive the owner of substantial property rights. This is a significant difference.

Further, the Zoning Board did not specifically make the required finding concerning sub-part (1) of 329.03(b). In essence, this requirement states that Storer/Clinton must prove and the Zoning Board must find that the "zoning requirement unreasonably deprives an owner of a permitted use of the property" *Duncan*, at 86. None of the remaining sections of the resolution, numbered 1 through 5, address this requirement. Again, the Zoning Board failed to make findings necessary to satisfy a required sub-part of 329.03(b).

Based on the Zoning Board's failure to make the specific findings concerning subparts (1) and (2) CCO 329.03(b), this Court finds that the Zoning Board's decision was capricious, unreasonable, or unsupported by the preponderance of the substantial, reliable, and probative evidence on the whole record." R. C. 2506.04; therefore, the decision of the Zoning Board granting these two variances is reversed and remanded to the Zoning Board.

Even though there is a new ordinance that no longer requires a variance, it nevertheless is appropriate to remand this case to the Zoning Board for further proceedings consistent with this opinion in order to conform its resolution to the evidence presented, or to take additional evidence to satisfy its obligation to make specific findings concerning the three subparts of 329.03(b). *Kutock*, at ¶¶ 21, 22. There may be significant res judicata principles in play whether these variances do run with the land, if granted after remand, and if the zoning ordinance is changed, or successfully challenged. Storer/Clinton may lose the ability to pursue the variances,

and it was the Zoning Board that failed to make findings whether Storer/Clinton did or did not have facts to support its position regarding the CCO 329.03(b) and the seven factors stated above by the Supreme Court of Ohio in *Duncan*.

Even without the new ordinance, a remand is appropriate because the Zoning Board failed to state in its resolution that the Zoning Board made findings concerning a substantial number of the seven factors stated above by the Supreme Court of Ohio in *Duncan*, or even that it weighed or considered these factors. It is clear from the nature of size and scope of this project and its impact on the community that such detailed analysis was required to properly evaluate whether these variances were justified in order to permit this 67-unit apartment building to be developed at this location in this community.

For all the forgoing reasons, the decision of the Zoning Board is reversed, and this case is remanded for further proceedings consistent with this order.

**IT IS SO ORDERED.**

DATED: 4/4/16

  
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JUDGE MICHAEL E. JACKSON

**THE CLERK OF COURT SHALL SERVE A COPY OF THE FOREGOING JOURNAL ENTRY AND OPINION ON ALL COUNSEL OF RECORD AT THE ADDRESS LISTED ON THE COURT DOCKET.**