

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

DAVID D. WATSON)	Case No. CV-15-845662
)	
Appellant)	JUDGE CASSANDRA COLLIER-WILLIAMS
)	
vs.)	
)	
CITY OF CLEVELAND, ET AL.)	
)	
Appellees.)	<u>FINAL OPINION AND ORDER</u>
)	

This case originally came before the Court on May 5, 2015 as an Administrative Appeal under Ohio Revised Code 2506. On April 8, 2016, the Court issued a judgment entry which affirmed the decision of the City of Cleveland’s Board of Zoning Appeals (“Board”) which granted several area variances sought by Appellee E. 123rd St. Properties (“East 123 St. and/or “Appellee”) to erect an apartment building at 1862 East 123rd Street (aka 1885 Coltman Road) in Cleveland, Ohio. The Court’s judgment entry read that “the decision of the City of Cleveland Board of Zoning Appeals is hereby affirmed.”

David Watson (“Watson” and/or “Appellant”) filed an appeal with the Court of Appeals for the Eighth District on April 22, 2016. On March 15, 2017, the Eighth District issued a journal entry which states “Sua sponte, this matter is returned to the trial court for the court to conduct the review required by R.C. 2506.04 and enter a judgment capable of appellate review by this court.” The Eighth District instructed this Court to complete its review within thirty (30) days of their order.

On March 22, 2017, this Court issued a second judgment entry which stated "Pursuant to O.R.C. 2506.04 and based upon a review of the whole record and attendant briefs, this court finds the decision of the Cleveland Board of Zoning Appeals in this matter was not unconstitutional, illegal, arbitrary, capricious, unreasonable or unsupported by the preponderance of substantial, reliable and probative evidence. Therefore, the decision of the Board is hereby affirmed. Final."

On May 25, 2017, the Eighth District reversed the trial court's decision and remanded "with instruction for the court to conduct the evidentiary analysis required by statute and generate an entry capable of review by this court."

Following such review, this Court hereby affirms the decision of the Board of Zoning Appeals granting the variances to E. 123rd Street Properties.

Factual Background

East 123 St. Properties is the owner of the property ("Property") located at 1862 East 123 St. in Cleveland, Ohio. The Property is situated in a B2 Semi-Industry District. The Property aka Woodhill Supply Company is currently an abandoned building. Woodhill Supply is a pipe fabrication company for PVC, plumbing, HVAC and other tools. In 2010, the company moved its operations from East 123rd to 5450 South Marginal Road in Cleveland, Ohio.

Appellee East 123 St. planned to erect a 204 unit apartment building with 258 accessory off-street parking spaces on the property. East 123 St. submitted a building permit application to the City of Cleveland's Building and Housing Department. Their application was denied and a Notice of Non-Conformance, citing several zoning code

violations involving the maximum gross floor area of the building, rear setback concerns and the height of the proposed structure. The Appellee would require several area variances to proceed with the plans and therefore, appealed the denial with the Board of Zoning Appeals.

There were two hearings before the Board. The first hearing was on January 5, 2015 and the second hearing was on May 4, 2015. The Board heard testimony from the following representatives; Brad Goldberg, representative for East 123 St; Denver Booker, the architect for the project; Rennie Crawford, Executive Assistant for former Councilwoman Mamie Mitchell; the City of Cleveland Planning Department; Donald Petit, the Landmarks Commission; and the Director of the Little Italy Development Corporation and several residents/property owners in support of the project. The Board also heard from the Appellant in this appeal, David Watson ("Watson"), his attorney; Architect Elizabeth Murphy; Planner Mark Majewski and Engineer David Harper who were opposed to the project.

The Board heard testimony from several residents/property owners from the area who opposed the variances primarily because they did not want an apartment building to be constructed; their preference was for single family houses or townhouses. Since the Property is situated in a B2-Semi-Industry District, there is no zoning restriction against apartment buildings in this district.

The Board's Resolution indicates that they considered all of the testimony, documents, exhibits and correspondence submitted at the hearing in reaching their decision to grant the area variances requested by the Appellee.

Applicable Law

Ohio Revised Code §2506.01 provides for the appeal of an order from any board of a political subdivision to the Court of Common Pleas. In reviewing an appeal of an administrative decision, "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 R.C.2506.04.

In a R.C. 2506 appeal, the Common Pleas Court must weigh the evidence in the record, and whatever additional evidence may be admitted under R.C. §2506.03, to determine whether there exists a preponderance of reliable, probative evidence to support the agency's decision. *Dudukovich v. Lorain Metro. Hous. Auth.* (1979), 58 Ohio St.2d 202, 207. The court, however; may not blatantly substitute its judgment for that of the agency, especially in areas of administrative expertise. *Id.* If there is a preponderance of reliable, probative and substantial evidence, the Common Pleas Court must affirm the agency's decision. *Id.*

Analysis

As grounds for its appeal, the Appellant argues that East 123 St. failed to demonstrate the practical difficulties criteria found in *Duncan v. Middlefield* (1986), 23 Ohio St. 3d 83 and therefore, the Board of Zoning Appeals' decision was illegal, arbitrary, capricious, unreasonable, and unsupported by a preponderance of reliable,

probative and substantial evidence. Having reviewed the record, this Court does not find this argument to be persuasive.

In order for the Board to grant a specific variance, the person seeking the variance must establish the conditions required by Cleveland Codified Ordinance 329.03(1), (2) and (3).

Cleveland Codified Ordinance 329.03(b) states:

- 1) The **practical difficulty** or unnecessary hardship inheres in and is peculiar to the premises sought to be built upon or used because of physical size, shape or other characteristics of the premises or adjoining premises which differentiate it from other premises in the same district and create a difficulty or hardship caused by the strict application of the provisions of the 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 the variance appealed for will not be contrary to the purposes and intent of the provisions of the Zoning Code.

Practical Difficulties and the Duncan Factors

A property owner applying for an area variance must demonstrate "practical difficulties" in complying with a zoning regulation. *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30. Practical difficulties are established whenever the zoning requirement unreasonably deprives the landowner of a permitted use of their property. *Duncan v. Middlefield* (1986), 23 Ohio St. 3d 83. *Duncan* lists seven (7) factors to be considered and weighed to determine whether a property owner has encountered practical difficulties. The factors are: (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 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, etc.); (5) whether the property owner purchased the property with knowledge of the zoning restrictions; (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 a variance.

No single factor controls in the determination of practical difficulties; the inquiry should focus on the spirit rather than the strict letter of the zoning ordinance so that substantial justice is done. *Duncan v. Middlefield* (1986), 23 Ohio St. 3d 83. Consequently, a variance may be granted even if some factors weigh in favor of a landowner, or are inconclusive. *Id.* The factors are non-exclusive; they are not mandatory. In deciding upon the reasonableness of an area zoning requirement, as applied to the specific property owner at issue, no single factor will be determinative. *Duncan*. The "key to this standard" is whether the area zoning requirement is reasonable. "The property owner is required to show that the application of an area zoning requirement to his property is inequitable." *Duncan*.

The Board is not required to make a factual finding as to each factor to support their decision to grant or deny a variance. *Carrolls Corp. v. BZA City of Willoughby (Lake Cty.,)*, 2006 Ohio App. LEXIS 3379.

A review of the record shows that there was ample evidence to support the Board's decision to grant the requested variances:

Reasonable Return/Beneficial Use

Testimony at the hearing established that the existing building is no longer economically viable, as Woodhill Supply Company has moved their operations and the Property has been condemned by the City. All of the residents, pro or con, who testified at the Board's hearing were unhappy with the current abandoned and condemned building. The proposed apartment building is a gross improvement over the existing building. Testimony has shown that the density is necessary for a project to be viable on this property.

Substantial Variance

The Appellant argues that the setback and height variances sought by the Appellee are excessive and inconsistent with the area. In its Resolution, the Board determined that the setbacks and height variances have been vetted through the design review process which took into account the complicated issue of having two front yards and the final design is the best possible result. The Board addressed the density issue by finding that the "massing would be permitted if it were any other use allowed in the Semi-Industrial District." Adjoining properties in the area won't suffer a substantial detriment with the requested area variances.

Substantial is not a rote recitation or comparison of percentages but a weighing of many substantive factors. *Carrolls Corp. v. BZA City of Willoughby (Lake Cty.,)*, 2006 Ohio App. LEXIS 3379. Each variance must be reviewed to its own specific facts and circumstances.

Essential Character of the Neighborhood

The essential character of the neighborhood will not be substantially altered by the requested variances. The current housing in this area consists of single family houses, two-family houses, townhouses, apartment buildings, restaurants, retail establishments, etc. While the proposed apartment building would be larger than the other apartment buildings in the area, it would create more residential density in the neighborhood.

The area is a historic district. The architect for the project along with others testified that the design of the apartments blends in with the historic nature of the area. The Landmarks Commission issued a Certificate of Appropriateness for the demolition of the manufacturing building and approved the design of the 204 unit apartment building, along with the Local Design Review Committee; the Landmarks Commission found that the proposed apartment complex 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 Ordinances.

Knowledge of Zoning Restrictions

The Ohio Supreme Court in *Duncan* held that "[a] property owner is not denied the opportunity to establish practical difficulties... simply because he purchased the

property with knowledge of the zoning restriction. The Appellant's witness, Planner Mark Majewski testified "I also don't know if the property owner purchased the property with knowledge of the zoning restriction."

Deprivation of Substantial Property Rights

The Appellee wants to construct a residential apartment building in an area that primarily contains other residential structures. It is undisputed that the profitability of a particular project, in and of itself, is not a proper basis for granting a variance. *Dyke v. City of Shaker Heights* (2004 Ohio App. 8 Dist., WL 231792). Brad Goldberg from Visconsi testified "We need to do this type of mass to get a reasonable return on the property and we believe, if I may, we believe if anybody else came behind us they would find the same result." (Transcript, Page 191).

The real estate appraiser at the hearing acknowledged that there was a demand for apartments in the area and that the highest and best use for the property given its zoning was "multi-family." I believe the most profitable would be multi-family and, again, what's going on nearby when I formed that opinion and what's proposed." (Transcript, Page 166-167).

East 123 St. has the right to a financially viable way to redevelop their property. It is undisputed that the current building on the Property has been abandoned for years and has been condemned by the City.

The direct evidence presented at the hearing is clear that there can be no beneficial or reasonable return on the Property without the variances, and the Board's decision to grant the variances should be affirmed. Denial of the area variances will

deprive the Appellee of their substantial property right to utilize it in the most conducive way.

Purpose and Intent of the Zoning Code

Zoning ordinances which regulate concerns such as frontage, setback, and height are properly characterized as area zoning requirements. *Duncan v. Village of Middlefield* (1986), 23 Ohio St.3d 83. Zoning codes are designed to regulate the use of land, buildings and structures to promote the public health, safety and general welfare. When considering an area variance, the inquiry should focus on the spirit rather than the strict letter of the zoning ordinance so that substantial justice is done. *Dyke v. City of Shaker Heights* (2004 Ohio App. 8 Dist., WL 231792).

The appellants have not provided any convincing evidence that the variances requested by East 123 St. are contrary the needs of the public health, morals, welfare or public safety or that the granting the variances would be inconsistent with the spirit and intent of these zoning provisions.

Conclusion

The Board of Zoning Appeals is in a better position to gauge and weigh the testimony, and having weighed the evidence at the hearing, the Board unanimously agreed to grant the area variances requested by the Appellee East 123 St. There is a strong correlation between the testimony presented at the hearings and the Board's ultimate decision to grant or deny variances. The Board was fully within its authority to

base its decision on the facts presented in the record. The Board has the power to interpret the facts as given.

Pursuant to O.R.C. 2506.04 and based upon a review of the whole record and attendant briefs, this court finds the decision of the Cleveland Board of Zoning Appeals in this matter was not unconstitutional, illegal, arbitrary, capricious, unreasonable and was supported by a preponderance of substantial, reliable and probative evidence.

Upon consideration of the foregoing, the Appellant's appeal is DENIED and the decision of the City of Cleveland Board of Zoning Appeals is AFFIRMED.



JUDGE CASSANDRA COLLIER-WILLIAMS