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

MELNIIK'S AUTOMOTIVE LLC
Plaintiff

Case No: CV-17-882858

Judge: SHANNON M GALLAGHER

BOARD OF ZONING APPEALS OF THE CITY OF
CLEVELAND
Defendant

JOURNAL ENTRY

98 DISPOSED - FINAL

JUDGMENT ENTRY AND OPINION AFFIRMING THE CITY OF CLEVELAND BOARD OF ZONING'S RESOLUTION TO DENY APPELLANT'S PERMIT APPLICATION. COURT COST ASSESSED TO THE PLAINTIFF(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.

Shannon M Gallagher 1/24/18

Judge Signature Date

FILED
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WINDYBUSH
CLERK OF COURTS
CUYAHOGA COUNTY

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY

MELNICK'S AUTOMOTIVE, LLC)
Appellant,)
)
vs.)
)
BOARD OF ZONING APPEALS OF)
THE CITY OF CLEVELAND, ET AL.)
Appellee)

CASE NO. CV-17-882858
JUDGE SHANNON M. GALLAGHER

JUDGMENT ENTRY AND OPINION

Shannon M. Gallagher, J.:

Appellant Melnick's Automotive, LLC appeals from a Resolution of the City of Cleveland Board of Zoning denying Appellant's permit application authorizing Appellant's use of the Property at issue for an auto repair and sales business. The parties have briefed the issues and the court has considered all arguments. The Resolution issued by the City of Cleveland Board of Zoning Appeals was not unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. R.C. 2506.04. The Resolution denying Appellant's permit application is affirmed.

I. Background Facts and Procedural History

Appellant Melnick's Automotive is the owner of property located at 3208 Broadview Road in Cleveland, Ohio (the "Property"). Appellant purchased the Property at issue in October 2016. Appellant intended to use the Property for its auto repair and sales business. However, the Property is not zoned for such use. The Property has "split zoning" and is zoned for both semi-industry and local retail. The local retail portion was established in 2003. (Transcript p. 4). Auto repair is permitted on property zoned for semi-industry, but local retail zoning requires a variance for such use. (Transcript p. 20).

On January 5, 2017, Appellant submitted a building permit application and building plans to the City of Cleveland's Building and Housing Department. On January 12, 2017, the Building and Housing Department denied Appellant's permit application and issued a Notice of Non-Conformance. On February 9, 2017, Appellant appealed the Notice of Non-Conformance to the Board of Zoning Appeals. Appellant sought a variance from the strict application of the following sections of the Cleveland Codified Ordinances.

1. Section 343.01 which prohibits motor vehicle repair garage and motor vehicle sales facilities in a Local Retail Business District.
2. Section 352.08 through 352.12 which state that a six foot wide landscape frontages strip is required at Henninger to screen parking from street. A four foot wide landscaped transition strip is required separating proposed motor vehicle repair garage facility from adjoining premises in the Local Retail Business. A landscape plan and schedule was required.
3. Section 327.02(d)(e) which states that a Site plan drawn to a measureable scale and showing all features of the property is required. The Board concluded that Appellant's site plan was inadequate.

The Board held a public hearing on June 5, 2017. At the outset of the hearing, Attorney Laura Wagner, assistant director of law from the City's law department, advised the Board that Appellant was requesting a use variance and area variance from the landscaping and off-street parking regulations of the zoning code. Attorney Wagner also summarized the standard for requesting a use variance and an area variance. (Transcript p. 5).

To obtain a use variance, Appellant must prove that denying the request will create an unnecessary hardship particular to the property such that there will be no economically feasible use of the property without the variance, it will deprive the appellant of substantial property rights, and that granting the variance will not be contrary to the purpose and intent of the zoning code.

To obtain an area variance, Appellant must prove that denying the request will create a practical difficulty not generally shared by other land or buildings in the same district, will deprive the Appellant of substantial property rights, and the granting of the variance will not be contrary to the purpose or intent of the zoning code. (Transcript p. 5).

Appellant's representative, George Melnick, appeared pro se and testified that there are several other auto-oriented businesses in the immediate vicinity. He also stated that he intends to install a vinyl fence and landscaping to enclose the vehicle storage area. Mr. Melnick testified that there were only seven or eight vehicles being stored in the Property's parking lot. (Transcript p. 11). Mr. Melnick stated that many of the issues with the Property were actually on the neighboring parcel used by USA Auto.

The architect for the project, Michael Tomsick, testified that Mr. Melnick intends to enhance and beautify the Property to conduct his business. (Transcript p. 12). Mr. Tomsick noted that Mr. Melnick will be putting in fencing and landscaping, and will soon control an area adjacent to the Property that is currently being occupied by USA Auto. According to Mr. Tomsick, USA Auto is squatting on that adjacent land and parking bashed up vehicles making it appear unsightly. (Transcript p. 13). Mr. Tomsick emphasized that once Mr. Melnick has full control, he will remove the vehicles and enhance that area. Councilman Brancatelli later contradicted this testimony with information that Appellant was in currently possession of that adjacent area pursuant to a land contract, and consequently responsible for its maintenance. (Transcript p. 18).

Several individuals offered testimony opposing the variance. Jeff Verespej, Executive Director of the Old Brooklyn Community Development Corp., testified that he had received calls from residents in the neighborhood voicing concerns about the condition of the Property. Mr.

Verespej was personally concerned because the site of the future Lower Big Creek Park was directly adjacent to the Property. Mr. Verespej also had concerns about the number of vehicles in the parking lot, noting that at times there could be 15 to 20 vehicles. Mr. Verespej also noted that he had met with Mr. Melnick in early 2017 and voiced his concerns about the condition of the Property. Mr. Verespej stated that since that meeting, Mr. Melnick had not addressed the Planning Department's concerns. (Transcript p. 15).

Councilman Anthony Brancatelli also offered testimony opposing the variance. He submitted photos of the site to demonstrate the poor condition of the Property. The photos show 12 to 14 wrecked vehicles, as well as high grass and weeds growing along the fence lines. The Property is adjacent to residential apartments, and the Councilman was concerned about truck traffic so close to that housing. (Transcript p. 17). Councilman Brancatelli also testified that, while he had met with the architect, the recommendations proposed by the architect were not reflective of the plans that were submitted to the Board. (Transcript p. 18).

George Cantor from the City Planning Commission testified that the zoning on the Property was previously changed to Local Retail Business to eliminate auto-oriented retail uses along that portion of Broadview Road and foster growth of more neighborhood-oriented retail uses. (Transcript p. 20-21).

Based upon the evidence presented at the hearing, the Board concluded that the variance should be refused, that the refusal would not cause the owner to suffer an unreasonable hardship, and that granting the variance would be contrary to the purpose and intent of the Zoning Code.

Appellant subsequently appealed the Board's decision to this Court. For the reasons that follow, the court overrules the appeal and affirms the Board's Resolution denying the variance.

II. Law and Analysis

a. Standard of Review

This appeal is governed by Revised Code Chapter 2506. Pursuant to R.C. 2506.04, a court may reverse the administrative body's decision only upon a finding that the decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. The court must proceed under the presumption that the decision of the administrative agency is reasonable and valid. *Community Concerned Citizens, Inc. v. Union Twp. Bd. of Zoning Appeals*, 66 Ohio St.3d 452, 456, 613 N.E.2d 580 (1993); *Mayfield Hts. v. Snappy Car Rental*, 110 Ohio App.3d 522, 526, 674 N.E. 2d 1193 (8th Dist. 1995).

The Board of Zoning's Resolution denying the variance is not unconstitutional, illegal, arbitrary, capricious, unreasonable, and is supported by substantial, reliable, and probative evidence.

b. Burden for Obtaining a Variance

When seeking a variance, an appellant must state and substantiate its claim that the following three conditions exist:

1. The practical difficulty or unnecessary hardship inheres in and is peculiar to the premises sought to be built upon or used because of the 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.

C.C.O. § 329.03(b).

The appellant seeking the variance has the burden of proof before the Board. C.C.O. § 329.03(c). Appellant failed to satisfy all conditions required by C.C.O. § 329.03.

Appellant did not present any evidence at the hearing showing that there was either a “practical difficulty” or an “unnecessary hardship” peculiar to the property because of its physical size, shape or other characteristic making it unusable for the permitted use of local retail. C.C.O. § 329.03(b)(1). Rather, Appellant’s representative, Mr. Melnick argued at the hearing that he paid \$300,000 for the property with the intent of using it as an auto facility, and that he would not be able to run his auto repair and sales business without the variance. However, Appellant’s assertion that he would not be able to use the Property for the use Appellant intended does not render the Property worthless.

Also, there is no evidence that denial of the variance deprives appellant of substantial property rights as required by C.C.O. § 329.03(b)(2). Again, Appellant’s arguments focus on the fact that Appellant will be unable to use the Property for Appellant’s business, causing a financial hardship. However, Appellant purchased the Property with zoning restrictions that prevented its use for auto repair and sales. An owner that creates its own hardship cannot apply for a zoning variance based on that hardship. *Consolidated Mgmt. v. City of Cleveland*, 6 Ohio St.3d 238 (1983).

Finally, granting the variance would be at odds with the intent of the zoning code. Mr. Cantor testified that the City Council changed the zoning of the Property in 2003 to Local Retail to encourage more neighborhood-oriented retail uses and to prohibit automobile-oriented businesses. (Transcript p. 21). Councilman Brancatelli and Mr. Verespej both testified that Appellant’s business involved wrecked vehicles being stored on the Property, and that the condition of the Property was unsightly, with overgrown weeds and unpaved lots. Mr. Verespej

was concerned about the condition of the Property because of the future plans for the Lower Big Creek Park. Truck traffic at the site was already seen as a problem, with large 18 wheelers maneuvering on Broadview. Based upon the evidence presented, the Board concluded that the condition of the Property makes it a nonconforming use with the intended future direction of the district. (Transcript p. 27). Therefore, granting the variance would be at odds with the intent of the zoning code.

The Board also found that the site plan was deficient. Assistant Law Director Laura Wagner noted that Appellant failed to present a plan with specific details of the intended improvements. (Transcript p.26). Councilman Brancatelli recommended that the Board should not allow the variance to move forward unless there was a new plan submitted. (Transcript p. 19). Attorney Wagner encouraged Appellant to spend a little more money and present a plan with more details. (Transcript p.26). She advised that he could withdraw his request and try to apply again with a new plan. Appellant chose not to withdraw, and the Board made its decision to deny the variance. (Transcript p. 29).

c. Appellant's Constitutional Challenge is without Merit

Appellant argues that the Board's decision denying the variance was unconstitutional and in violation of the equal protection clause. Appellant relies upon the case *Willowbrook v. Olech*, 120 S.C.t 1073 (2000), which stands for the proposition that an equal protection action can be brought on behalf of a "class of one," where the plaintiff has been intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment.

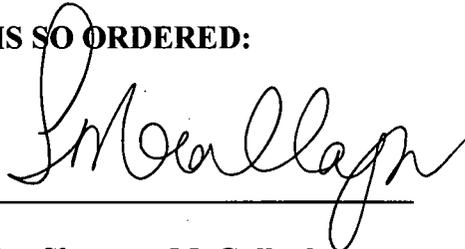
Appellant argues that USA Auto occupies an adjacent property and is an auto-oriented business. (Transcript p. 21). However, there is no evidence that the Board intentionally treated

Appellant differently than USA Auto. There was no specific information provided as to how USA Auto was "similarly situated" to Appellant.¹ Nor was there evidence that USA Auto at one point applied for and was granted a similar variance. Finally, as discussed above, the Board had a rational basis for denying the variance because the denial was consistent with the intent of the zoning code.

III. Conclusion

For the reasons outlined above, the Board's Resolution was not unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. R.C. 2506.04. The court affirms the Resolution denying Appellant's permit application. Costs to Appellant.

IT IS SO ORDERED:



Judge Shannon M. Gallagher

1/24/10

Date

¹ Appellant attached exhibits to its reply brief purporting to be evidence of the Board's equal protection violation. However, the documents were not part of the original record, nor were they authenticated in any way. Therefore, this court did not consider these documents.