

ORIGINAL

IN THE SUPREME COURT OF OHIO

6957 RIDGE ROAD, LLC,

Appellant

vs.

CITY OF PARMA, et al.

Appellees

CASE NO. 2013-1859

On Appeal from the Cuyahoga
County Court of Appeals
Eighth Appellate District

Case No. CA-12-099006

MEMORANDUM IN OPPOSITION TO JURISDICTION
BY APPELLEES CITY OF PARMA, PARMA BOARD OF ZONING APPEALS
AND PARMA CITY COUNCIL PLANNING COMMITTEE

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**I. APPELLANT'S APPEAL INVOLVES NO SUBSTANTIAL
CONSTITUTIONAL QUESTIONS AND DOES NOT POSE ANY QUESTION OF
PUBLIC OR GREAT GENERAL INTEREST**

This case arises out of the purchase by Appellant 6957 Ridge Road, LLC (hereinafter, "Appellant") of a residential home and property in a Single-Family Zoning District in the city of Parma, Ohio. Appellant filed an application for a rezoning of the property to a Retail Business District and was denied. Appellant subsequently filed an application for a use variance and was again denied. The case at bar presents nothing more than straightforward application of zoning and constitutional principles, and there is no unique factual or legal issue.

Appellant asks this Honorable Court to review the facts of this case again, hoping to reach a different result. However, Appellant presents no viable reason for doing so. Section 2(B)(2)(a)(iii) of Article IV of the Ohio Constitution dictates that the Supreme Court of Ohio shall have appellate jurisdiction in cases involving questions arising under the United States and Ohio Constitutions. Section 2(B)(2)(e) of Article IV of the Ohio Constitution dictates that the Supreme Court of Ohio's discretionary jurisdiction is reserved for "cases of public or great general interest." This third attempt by Appellant for a favorable ruling does not involve any substantial constitutional questions for review, and is not a case of public or great general interest. This Honorable Court should deny jurisdiction to Appellant in this matter.

II. STATEMENT OF THE CASE AND FACTS

Appellant 6957 Ridge Road, LLC purchased the residential home and property at 6957 Ridge Road in Parma, Ohio, on September 30, 2010. The property is located in a Single-Family Zoning District (residential). Consequently, Appellant filed an application for a rezoning of the purchased property to a Retail Business District. The Parma City Planning Commission voted to recommend to City Council an approval of the rezoning. Pursuant to Section 1129.12 of the Parma Codified Ordinances (hereinafter, "Codified Ordinances"), City Council has the authority to adopt or deny the recommendation of the Planning Commission, and Council exercised its authority to deny the rezoning. Subsequently, Appellant filed an application for a use variance pursuant to Chapter 1127 of the Codified Ordinances. On August 9, 2011, the Parma Board of Zoning Appeals (hereinafter, "BZA") split the vote 2-2 (one member absent) regarding the variance. Following the 2-2 split, one member of the BZA changed his vote from "no" to "yes" in order to give Appellant "the democratic process that they are due..." and the "opportunity to present it to Council..." The BZA then voted 3-1 in favor of the use variance. At a September 21, 2011 special meeting of the Parma Planning Committee of City Council, evidence and testimony in favor of and against the use variance were heard over the course of more than five hours. Immediately following the committee meeting, a special meeting of Parma City Council was held, and Council denied the variance by a vote of 8-0, with one council member absent.

Appellant appealed City Council's decision to deny the use variance, pursuant to Chapter 2506 of the Ohio Revised Code. On August 30, 2012, Cuyahoga County Common Pleas Court issued a journal entry and opinion on Appellant's appeal. The court found that Parma City Council's decision to deny Appellant's application for a use variance was not unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable and probative evidence. As such, the decision of City Council to deny the use variance was affirmed.

Appellant issued a Notice of Appeal to the Eighth District Court of Appeals, Cuyahoga County, on September 28, 2012. After briefing and oral argument, the Court of Appeals affirmed the trial court's decision on September 30, 2013; subsequently, the Court denied Appellant's Application for Reconsideration on October 9, 2013.

Appellant filed a Notice of Appeal in this Honorable Court on November 22, 2013.

III. LAW AND ARGUMENT

PROPOSITION OF LAW NO. 1

An owner's knowledge or notice of zoning restrictions prior to acquiring or purchasing real property does not bar such owner from obtaining a use variance if the property is otherwise burdened with an unnecessary hardship.

Section 1127.09 of the Parma Codified Ordinances articulates the reasons and standards for granting use variances within the city, as follows:

(a) Where unnecessary hardships would result from the literal application of the provisions of this Zoning Code. Hardships which are unavoidable if the purpose and intent of this Zoning code are to be realized, **such as theoretical loss or limited possibilities of economic advantage, are not unnecessary hardships. Likewise, a hardship based on conditions created by the owner is not an unnecessary hardship.** It must be found that there are peculiar and special hardships as are applicable to the property involved which are separate and distinct from the general hardship in the use district;

(b) Where exceptional circumstances or conditions, only applicable to the property involved or to the intended use of the property, do not apply to other property within the same use district. The mere fact that the owner of one parcel might apply prior to the owner of other parcels in the same area would not give him a right to a variance. In such circumstances, a variance would be a special privilege for an individual that would be necessarily denied to others. It must be found, on the other hand, that there are exceptional conditions justifying a variance on one lot, such as topographical or geological conditions or the type of adjoining developments, and that a variance would be justified on any lot where the same exceptional circumstances prevail.

(c) Where granting of a variance will not be **materially detrimental to the public welfare or injurious to the property or improvements in the neighborhood in which the property is located.** The mere existence of any unnecessary hardship or other exceptional circumstance is not ipso facto evidence for granting of a variance, for such hardships must be balanced against the present conditions and the extent to which such a variance would interfere with the proper future development and rights of adjacent property.

(d) Where the granting of a variance will not be contrary to the general purpose, intent and objectives of this Zoning code or other adopted plans. A variance merely permits that which is contemplated in this Zoning code for unnecessary hardships and exceptional circumstances. On the other hand, that which was not contemplated in this Zoning Code, although deemed desirable, should be effected by amendments. (emphasis added)

As indicated in its Conclusions of Fact, City Council was unequivocal in its reasoning in denying Appellant's application for a use variance, concluding that

Appellant failed to demonstrate that an unnecessary hardship would result from literal application of the Zoning Code. The determination of unnecessary hardship "is one of fact entrusted to the board's discretion." Schomaeker v. First Natl. Bank of Ottawa (1981), 66 Ohio St.2d 304. Council applied the specific criteria of Section 1127.09 of the Codified Ordinances as outlined above, noting in its Conclusions of Fact that theoretical loss or limited possibilities of economic advantage are not unnecessary hardships, and that a hardship based on conditions created by the owner is not an unnecessary hardship. The evidence is very clear that Appellant purchased the property at 6957 Ridge Road with the knowledge that it was zoned for residential and not for commercial or retail use. Council's decision was specifically based on the fact that Appellant created his own hardship.

Section 1127.09(a) of the Codified Ordinances, *supra*, states clearly that a self-imposed hardship, such as Appellant created in this case, does not meet the criteria for granting a use variance. In addition, it is well-settled that property owners are not afforded relief from hardships which they create. In Consolidated Management, Inc. v. City of Cleveland (1983), 6 Ohio St.3d 238, the Supreme Court of Ohio determined that the property owners imposed a hardship upon themselves because they acquired an interest in the premises with knowledge of the zoning classification. The Court went on to state as follows:

Where a purchaser of commercial property acquires the premises with knowledge of certain zoning restrictions, he has created his own hardship and generally cannot thereafter apply for a zoning variance based on such hardship. The record before us is void of any clear evidence of unnecessary hardship or practical difficulty except those created by appellees. The mere fact that appellees' property can be put to a more

profitable use does not, in itself, establish an unnecessary hardship where less profitable alternatives are available within the zoning classification. (*Id.* at 242)

This Honorable Court's self-imposed hardship standard has since been applied in *Nigro v. City of Parma*, 2003 WL 22922977 (Ohio Ct. App. 8th Dist. Cuyahoga County 2003). In *Nigro*, the Eighth District Court of Appeals applied the *Consolidated Management* standard to the facts of the case, determining that where a purchaser of property acquires the premises with knowledge of the zoning restrictions, he has created his own hardship and generally cannot thereafter apply for a zoning variance based on such hardship. See also *Moulagiannis v. City of Cleveland Board of Zoning Appeals*, 2005 WL 1048134 (Ohio Ct. App. 8th Dist. Cuyahoga County 2005). "(T)here is no evidence in the record of an unnecessary hardship except of that imposed by Moulagiannis on himself."

As stated in *Craig v. Babcock*, 1991 WL 147446 (Ohio Ct. App. 11th Dist. Portage County 1991), "a person who knowingly acquires property *intending to use it in a manner prohibited by the existing zoning ordinance* may not thereafter obtain a use variance based upon unnecessary hardship. See, 3 Anderson, *American Law of Zoning* (3 Ed. 1986), Variances, Section 20.45 ("The self-created hardship rule has been applied most frequently to persons who acquired land for a purpose outlawed by the zoning regulations.") *Id.*," Furthermore, said the Eleventh District Court of Appeals in *Craig*:

...the self-imposed hardship rule **militates only against** those who acquire property intending to use the land for a prohibited purpose, **speculating that the use variance would be available or might be obtained through affirmative efforts**. By the same token, this approach **s pares** the person who purchased with knowledge of the restrictions and **conformed** his use, but because of changed conditions on adjacent properties, suffers hardship independent of, and without regard to, any self-inflicted conditions. (emphasis added)

In the instant case, the owner of the subject property clearly did not satisfy the criteria for a use variance, as established by city ordinance and by case law, because it is patently obvious that he created his own hardship. He admitted that he had full knowledge of the zoning restrictions on his residential property when he purchased it, and he assumed that he would be able to obtain a rezoning of the property or obtain a use variance so that he could proceed with a commercial/retail use. He intended to use the land for a prohibited purpose, speculating that a rezoning or a use variance would be available. In no way did Appellant purchase this property with any intention to conform its use to its residential zoning restrictions. He created his own hardship in such a way that the Supreme Court of Ohio's self-imposed hardship rule applies directly to him.

Appellant argues that the United States and Ohio Supreme Courts have specifically held that the purchase of property with notice of a zoning regulation does not automatically bar an owner from challenging such regulation. State ex rel. Shelly Materials, Inc. v. Clark Cty. Bd. of Commrs. (2007), 115 Ohio St.3d 337; Palazzolo v. Rhode Island (2001), 533 U.S. 606; Lake Pointe Construction co., Inc. v. Avon (2009), 182 Ohio App.3d 554; State ex rel. Shemo v. Mayfield Heights (2002), 95 Ohio St.3d 59. As to these cases, they are distinguishable

from the instant case as involving issues of eminent domain, and the taking of property without just compensation.

PROPOSITION OF LAW NO. 2

Courts reviewing the constitutionality of zoning regulations may not simply engage in superficial scrutiny by relying on unsubstantiated lay opinions and must strike down zoning regulations that have only incidental or pretextual public benefits.

When challenging a zoning regulation on constitutional grounds, the parties attacking the regulation must demonstrate that it is “clearly arbitrary and unreasonable and without substantial relation to the public health, safety, morals, or general welfare of the community.” Goldberg Cos., Inc. v. Richmond Hts. City Council (1997), 81 Ohio St.3d 207, 214. The court must focus on whether or not Appellant has satisfied its burden of proof in showing that an existing zoning classification is unconstitutional. The focus cannot be on Appellant’s proposed use of the property. See Visconsi-Royalton, Ltd. v. City of Strongsville, 2004 WL 2071522 (Ohio App. 8th Dist. Cuyahoga County 2004).

Ohio courts have not defined a “legitimate governmental interest,” but they have found, for example, that cities have a legitimate governmental interest in maintaining the residential nature of a community, Young Israel of Beachwood v. City of South Euclid, 2006 WL 2441773 (Ohio App.8th Dist. Cuyahoga County 2006); maintaining the aesthetics of a community, Franchise Developers, Inc. v. City of Cincinnati (1987), 30 Ohio St.3d 28; and protecting the value of real estate, Northern Ohio Sign Contractors Assoc. v. City of Lakewood (1987), 32 Ohio St. 3d 316. These are legitimate governmental interests that may be

protected by the reasonable exercise of a municipality's police power where such actions bear a substantial relationship to the general welfare of the public.

Franchise Developers, Inc., supra.

Other municipalities have argued that controlling the flow of traffic and noise pollution are legitimate governmental interests. Shemo v. Mayfield Heights (2000), 88 Ohio St.3d 7, *supra*. In addition, the Ohio Supreme Court has found that a municipality had a legitimate government interest in creating a zoning classification to serve as a buffer between commercial and residential properties. Cent. Motors Corp. v. Pepper Pike (1995), 73 Ohio St.3d 581.

The subject residential property at 6957 Ridge Road in Parma, on the east side of the street, abuts other residential properties on nearby Regency Drive, and is adjacent to the city of Parma's historical site at Stearns Homestead. The Parma city engineer conveyed to City Council that there is a distinct and significant difference between the subject property and the various commercial businesses adjacent to it and across Ridge Road: these other properties all have multiple aprons, and thus, multiple ingress and egress points so that traffic can properly distribute. The Fifth Third Bank building adjacent to the property has two aprons, one each on Ridge Road and Regency Drive. On the west side of Ridge Road, Wendy's Restaurant has direct access onto Ridge Road, as well as from a private drive off Ridge Road. Kohl's and Target Department Stores, and Outback Restaurant, each have multiple access points. Conversely, 6957 Ridge Road has only one means of access, directly on Ridge Road, and the increased traffic, the access of southbound traffic turning left onto the property, and traffic

turning left onto southbound Ridge Road from the property, are all legitimate areas of concern that are unique to 6957 Ridge Road, and that are not common to the surrounding commercial establishments.

Even assuming the nearby property owners are similarly situated and Appellant was treated differently from them, City Council had a rational basis for doing so. In evaluating whether a rational basis exists, the court must first identify a valid state interest and determine whether the method or means by which the state has chosen to advance that interest is rational. Pickaway County Skilled Gaming v. Cordray (2010), 936 N.E.2d 944, 951. The party challenging the constitutionality must negate every conceivable basis which might support the government action. Young v. Mahoning County, 418 F.Supp.2d 948 (N.D. Ohio, 2005).

City Council, in its Conclusions of Fact, articulated several factors in determining that Appellant's use variance should be denied, including: the failure of Appellant to demonstrate that the property is not suitable as a residence; the failure of Appellant to present any information as to a specific proposed use of the subject property; the proximity of the property to Stearns Homestead; and evidence of potential riparian issues along the property line. In addition, as indicated herein, the city engineer relayed to council his concerns regarding increased traffic. City Council's actions were rationally based, and Appellant has failed to negate every conceivable basis which might support Council's actions.

As to the potential riparian issues on the subject property, City Council examined photographic evidence presented at the Planning Committee meeting

and contained in the record. These photographs and accompanying testimony from adjacent residents raised legitimate concerns regarding flooding, regardless of whether any riparian setbacks would be violated. In any event, it is clear from the facts of this case that Council's decision did not turn on simply riparian or flooding issues; these were among multiple factors which Council considered in denying Appellant's application for a use variance.

PROPOSITION OF LAW NO. 3

The participation of decision makers who have previously testified as witnesses opposing a particular matter or who have publically stated their opposition to such matter is unconstitutional in a quasi-judicial proceeding concerning that same matter.

It is well-settled that a reviewing court must presume that the decision of an administrative agency is valid and was reached in a sound manner. This presumption imposes upon an appellant the burden of proving his or her contention that a hearing examiner in a cause was biased, partial or prejudiced to such a degree that the hearing examiner's presence adversely affected the board's decision. *State of West Virginia v. Ohio Waste Facility Approval Bd.* (1986), 28 Ohio St.3d 83. In *Hostetler v. Perrysburg*, 998 F.Supp 820 (N.D. Ohio 1988), the Court stated:

The cases in which bias has been found to exist, in violation of due process, involve one of two characteristics: either the decision makers derived a direct, pecuniary interest from decisions adverse to claimants, or the decision maker was engaged in adjudicative and executive functions in violation of the separation of powers.

In the case at bar, there is no evidence that the decision-making members of Parma City Council had any pecuniary interest in a decision adverse to

Appellant, nor were any councilmembers engaged in adjudicative and executive functions. Appellant has not overcome the burden of showing that Council members were biased to such a degree that their presence adversely affected their decision.

Appellant further alleges bias in claiming that several councilmembers previously testified or publicly spoke out against the variance; therefore, they demonstrated a lack of impartiality.

In FTC v. Cement Institute (1948), 33 U.S. 683, the U.S. Supreme Court held that although members of the Federal Trade Commission had entertained views about a hearing prior to its being held, this did not mean that the minds of those members were irrevocably closed. Several FTC members had previously testified before congressional committees concerning an issue, and some members had disclosed their opinion regarding same. The Court held that the members' previous testimony and opinions did not necessarily violate due process. In Pangburn v. CAB (1962), 311 F.2d 349, the First Circuit Court of Appeals stated it could not conclude that the "mere fact that a tribunal has had contact with a particular factual complex in a prior hearing, or indeed has taken a public position on the facts, is enough to place the tribunal under a constitutional inhibition to pass upon the facts in a subsequent hearing. We believe more is required."

In the instant case, Parma City Council, in the Planning Committee meeting conducted on September 21, 2011, heard approximately five hours of evidence and testimony in favor of and against the use variance. The

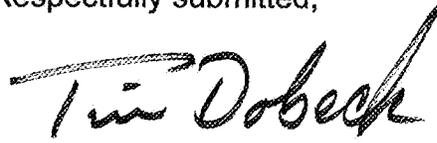
councilmember who chaired the Planning Committee meeting articulated, quite clearly, that the meeting was quasi-judicial in nature, and “open to the public but not a public hearing,” and that evidence would be taken. He stated that the Committee and Council would carefully consider all the evidence presented, and that Council would make a decision on the use variance based on that evidence. He stated further that if any members of the public wished to speak at the hearing, they had that right, but if they wanted their testimony to be considered by a reviewing court, then they were to be administered an oath and subject to cross-examination. It was made clear that unsworn testimony would not be considered as evidence. Appellant has not established that any previous statements, positions, or opinions made by any Parma City Councilmember affected his or her ability to be an unbiased decisionmaker, nor that any councilmember did not carefully consider all the evidence heard in the five-hour hearing.

The trial court properly concluded in this case that a fair and impartial hearing was held allowing all interested parties the opportunity to come forth and be heard on the issues. Evidence was presented and considered, and the appropriate standards for granting a use variance were applied. Appellant failed to meet those standards, and consequently was denied a use variance.

IV. CONCLUSION

This case involves no substantial constitutional questions, and is not a case of public or great general interest. For the foregoing reasons, Appellees City of Parma Board of Zoning Appeals, Planning Committee, and City Council; and City of Parma, respectfully request that this Honorable Court deny jurisdiction to Appellant 6957 Ridge Road, LLC, and dismiss the appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Opposition to Jurisdiction by Appellees City of Parma, Parma Board of Zoning Appeals and Parma City Council Planning Committee was sent by U.S. Mail, postage prepaid, on the - 20th day of December, 2013 to the following:

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