IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

RONALD J. H. O'LEARY	)	CASE NO: CV-23 976612
	)	
	)	
	)	JUDGE BRIAN MOONEY
Appellant	)	
	)	
vs.	)	
	)	
CITY OF CLEVELAND, OHIO BOARD OF ZONING APPEALS, ET AL	)	
	)	
Appellee	)	

BRIEF OF APPELLEE CITY OF CLEVELAND

Respectfully submitted,

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STATEMENT OF FACTS

The Cleveland Board of Zoning Appeals (BZA) is a five-member board responsible for hearing appeals from individuals who are requesting exceptions or variations for City Ordinances regarding land use and building requirements[1]. In this regard, the BZA has granted a number of zoning exceptions and variations several of which have been upheld by the court of common pleas and court of appeals[2]. See *Galli v. City of Columbus*, 2011-Ohio-1896, 193 Ohio App. 3d 415, 952 N.E.2d 525, 1415 *Kenilworth, LLC v. City of Cleveland,* 2023-Ohio-300 (Ct. App.); *Kurtock v. Cleveland Bd. of Zoning Appeals*, 8th Dist. Cuyahoga No. 105755, 2017-Ohio-8890, *Gajewski v. Bd. of Zoning Appeals*, 2008-Ohio-5270 (Ct. App.).

Lutheran Metropolitan Ministry Association of Greater Cleveland is a nonprofit corporation incorporated in 1971 with its principal office at 4100 Franklin Blvd Cleveland, Ohio 44113 (Property/Premises).

At the time of incorporation in 1971, the property district of Lutheran Metropolitan Ministry Association of Greater Cleveland was zoned multi-family. Subsequently, in 1985 it was changed to the current two-family residential zoning district. (BZA Transcript, Page 7)

In 1999, the name Lutheran Metropolitan Ministry Association of Greater Cleveland was changed to Lutheran Metropolitan Ministry ("LMM"). Lutheran Child Aid Society was registered in 1903 and changed its name to Lutheran Family Services in 2007.

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[1] Cleveland City Planning Commission (clevelandohio.gov); C.CO. 329.01

[2] Galli v. City of Columbus, 2011-Ohio-1896, 193 Ohio App. 3d 415, 952 N.E.2d 525, there, the common pleas court and court of appeals upheld the BZA finding that there was no established use for the parcel, and therefore did not improperly deprive the owner of the use of his property by reaching that conclusion. In 1415 Kenilworth, LLC v. City of Cleveland, 2023-Ohio-300 (Ct. App.) the Court of Appeals upheld the Cuyahoga court of common pleas decision that the BZA's finding was not unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by a preponderance of substantial, reliable, and probative evidence on the whole record because the record contained significant evidence demonstrating that a residential building absent provided on-site parking could exacerbate an existing parking problem. See also; Gajewski v. Bd. of Zoning Appeals, 2008-Ohio-5270 (Ct. App.).

In July 2009, the City of Cleveland issued a Certificate of Occupancy (COO) pursuant to Zoning Code §3195.10, which certified that the use of the Property for 'Lutheran Family Services" and its private offices complied with the Zoning Code. (See R. 67 at Tr. At 8) Under the COO, the building was allowed to have twenty (20) persons per floor and required to maintain exit lights, emergency lights and smoke detectors.

In 2017, Lutheran Metropolitan Ministry (LMM) was merged with Community Re-entry Inc and Lutheran Family Services. In 2020 LMM merged with Lutheran Metro Properties, LLC, and LMM Leveraged Lender, LLC. For each merger, LMM remained as the sole surviving entity. LMM and its integrated entities (Lutheran Family Services) have been using the Property as an "existing, legal, charitable institution." LMM and its predecessors have consistently complied with all conditions under the COO.

On or about April 8, 2022, Lutheran Metropolitan Ministry ("LMM") applied to the Cleveland Department of Building and Housing for a zoning review of exterior and interior renovations of the Property for a Youth Drop-In Center (YDIC/Center), specifically to "renovate existing legal non-conforming charitable institution to add use as drop in for teens and adults. And to expand hours of operation at a B1 Two-Family Residential District." Thus, the purpose of the Center was to essentially continue the provision of family and social services, with particular attention to the specific needs of young people between ages 16-24 experiencing homelessness and housing instability. LMM estimated that about seventy percent (70%) of the guests at the Center will be racial minorities and a significant number will be members of the LGBTQ community. The project

was supported by the Ward City Council Member, and a host of other entities and organizations[3]. It is noteworthy that the Center was not intended to be a shelter.

On May 13, 2022, by a "Notice of Non-conformance with respect to Site/Zoning Application B22009273," the Department of Building and Housing denied LMM's application.

On November 11, 2022, LMM filed an appeals application with the BZA. In the Appeal, LMM sought for the permit for "minor interior renovation of existing building, addition of a rear vestibule and patio, and minor upgrade to site including repaving of parking lot, and new privacy fence with gates." LMM specifically appealed for relief from the strict application of the following sections of the Cleveland Codified Ordinances:

1. Sections 337.03(b) and 337.02(g) which state that a charitable institution in a Two family Residential District must be at least 30 feet away from adjoining premises, and requires review and approval by the Board of Zoning Appeals after public notice and public hearing to determine if adequate yard spaces and other safeguards to preserve the character of the neighborhood are provided, and if in the judgment of the Board such buildings and- uses are-appropriately, located and designed and will meet a community need without adversely affecting the neighborhood. The proposed use is not 30 feet from adjoining premises.

2. Section 349.01(a) which states a use of building or land for which a permit has been lawfully issued, may be continued even though such use does not conform to the provisions of this Zoning Code for the use district in which it is located, but no enlargement or expansion shall be permitted except as a variance under the terms of Chapter 329, and no substitution or other change in such nonconforming use to other than a conforming use shall be permitted except by special permit from the Board of Zoning Appeals. Such special permit may be issued only if the Board finds after public hearing that such substitution or other change is no more harmful or objectionable than the previous nonconforming use in floor or other space occupied, in volume of trade or production, in kind of goods sold or produced, in daily hours or other period of use, in. the type or number of persons to occupy or to be attracted to the premises or in any other characteristic of the new use as compared with the previous use.

[3] Record of Appeal, page 196; Youth Drop-in-Center Neighborhood, Questions & Answers indicated that "the Youth Drop-In Center is an initiative of A Place 4 Me in partnership with Lutheran Metropolitan Ministry."

3. Section 341.02 which states approval of the Cleveland Landmarks Commission is required. (The Cleveland Landmarks Commission unanimously approved the variance on December 8, 2022)

A public hearing was held on February 6, 2023. At the hearing, LMM's attorney, Mr. Ben Ockner argued that "per a Certificate of Occupancy dated 2009, the legal permitted use of the property is a "charitable and family services" and that the establishment of the Youth-Drop-In-Center (YDIC) falls within that classification." Mr. Alan Weinstein, an emeritus professor at Cleveland State University argued that "the use will meet a community need without altering the character of the neighborhood as there are far more intense uses nearby including an 8-unit apartment building, a small boutique hotel, a youth hostel, an emergency shelter and an outreach center in the same block and across the street is a convalescent facility." Several other testimonies were taken; thirty letters in support of the project were submitted as opposed to nine letters in opposition by the neighbors.

After due consideration of the testimonies and evidence presented, the BZA granted LMM's request on February 6, 2023, observing that "the issuance of the Notice of Nonconformance was valid and a variance is needed". As such the BZA resolved per the resolution dated March 13, 2023, as follows:

"WHEREAS local conditions and evidence presented justify the Board in granting relief from practical difficulty and unnecessary hardship caused by strict compliance with specific provisions of the zoning ordinances. Refusal of the variance would deprive the owner of substantial property rights and granting the appeal will not be contrary to the purpose and intent of the Zoning code; now therefore,

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

The stated conditions were that:

- The hours of operation will be 9am to 7pm
- No person will be permitted to stay in the facility overnight.
- Loitering will not be permitted.
- LMM will provide transportation off site after services have been rendered.
- A security plan will be detailed and will be submitted in writing to the board. (LMM submitted the details of the security plan to the BZA on February 20, 2023.)

STATEMENT OF CASE

On March 14, 2023, ten (10) property owners on the same block as LMM's Property, filed an administrative appeal pursuant to Ohio Revised Code 2506 with the Cuyahoga Court of Common Pleas. On May 4, 2023, LMM was properly joined as an Appellee.

On March 20, 2023, Appellants filed an emergency motion to stay the execution of the Board of Zoning Appeals' decision of March 13, 2023. The motion was granted by the court on March 25, 2023. On April 27, 2023, Elizabeth Kukla, Secretary to the Board of Zoning Appeals, filed the official transcript with the Clerk of Courts pursuant to RC 2506.01(A).

On April 20, LMM filed a motion to dismiss all Appellants in the case except Appellant Ronald O'Leary. On May 24, 2023, the Court granted LMM's motion to dismiss all Appellants except Ronald O'Leary, the instant sole Appellant.

On September 22, 2023, the Appellant filed "assignments of error and a brief in support." The Appellees City of Cleveland and LMM filed a Motion for Extension of time to File Brief, on October 3rd and 4th respectively. On October 5, 2023, this Court granted Appellees a 30-day extension of time. As such the Appellees brief is due November 6, 2023, and Appellant's reply due November 13, 2023.

LAW AND ARGUMENT

A. STANDARD OF REVIEW

It is well established that in reviewing a decision of an administrative board, the courts will presume that the decision is reasonable and valid. *Wade v. City of Cleveland*, (8th Dist. 1982), 8 Ohio App.3d 176, 178. And in the absence of evidence that the decision was an abuse of discretion, or an act in excess of the power of the board, or unreasonable under all the circumstances, the board's decision will be upheld. *Id. Phillips v. City of Westlake Bd. of Zoning Appeals,* 2009-Ohio-2489 (Ct. App.)

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[4]. R.C. §2506.04. An administrative agency has broad discretion in its decision-making. A trial court should not overrule any agency decision when it is supported by a preponderance of reliable and substantial evidence. *Dudukovich v. Lorain Metro. Hous. Auth.* (1979), 58 Ohio St.2d 202, 207.

[4] Rauch v. Calligan, 2021-Ohio-2056 (Ct. App.) citing Henley v. City of Youngstown Bd. of Zoning Appeals, 2000-Ohio-493, 90 Ohio St. 3d 142, 735 N.E.2d 433.

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, *Rauch v. Calligan*, 2021-Ohio-2056 (Ct. App.) citing *Henley v. City of Youngstown Bd. of Zoning Appeals id, Kurtock v. Cleveland Bd. of Zoning Appeals*, 8th Dist. Cuyahoga No. 105755, 2017-Ohio-8890, *Rabkewych v. City of Cleveland Bd. of Bldg. Standards & Appeals*, 2015-Ohio-1952 (Ct. App.), 2000-Ohio-493, 90 Ohio St. 3d 142, 735 N.E.2d 433. The court, however, may not blatantly substitute its judgment for that of the agency, especially in areas of administrative expertise. *Dudukovich v. Lorain Metro. Hous. Auth. Id.* If there is a preponderance of reliable, probative and substantial evidence, the common pleas court must affirm the agency's decision. *Dudukovich v. Lorain Metro. Hous. Auth. Id.*

B. LMM MET THE STANDARDS UNDER CLEVELAND CODIFIED ORDINANCE §329.03 WHICH ALLOWED THE BOARD OF ZONING APPEAL TO GRANT THEIR VARIANCES.

C.C.O. § 329.03(c) requires that "the appellant shall state and substantiate their claim that the three conditions listed under division (b) of this section exist" when seeking a variance. C.C.O. § 329.03(b) limits the Board's variance powers to cases where all of the following conditions are satisfied:

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.

The appellant seeking the variance has the burden of proof before the Board. *Consol. Mgt., Inc. v. Cleveland*, 6 Ohio St.3d 238, 452 N.E.2d 1287 (1983) As set forth by the Ohio Supreme Court, "it is a fundamental principle of Ohio zoning that...the parties challenging the validity of a zoning classification have at all stages of the litigation, the burden of demonstrating the unconstitutionality or unreasonableness of the zoning code." *Mayfield-Dorsh, Inc. v. City of South Euclid* (1981), 68 Ohio St.2d 156, 157.

In considering a request for a variance, "the ordinance clearly sets forth three conditions that must be met by the party seeking the variance prior to the board's exercising the grant of such a variance." *Consolidated Mgmt. v. City of Cleveland* (1983), 6 Ohio St.3d 238, 242. Moreover, "it is necessary that the board of zoning appeals read and apply each subsection of Ordinance 329.03 *in para materia*." *Id.* Accordingly, for the Board to grant a specific variance, the person seeking the variance must establish the conditions required by C.C.O. § 329.03(1), (2) and (3). LMM satisfied each condition required by C.C.O. § 329.03(1), (2) and (3); therefore, the Board properly granted their variance requests.

These conditions required by C.C.O. § 329.03(1), (2) and (3); enumerated above are discussed seriatim.

1. Unnecessary hardship or Practical Difficulty

The Ohio Supreme Court, in *Kisil v. City of Sandusky* (1983) 12 Ohio St.3d 30, has taken the position that "practical difficulty" and "unnecessary hardship" applies to two different types of variances. The "Practical difficulty standard" applies to area variance whereas "unnecessary hardship" applies to use variance. An area variance authorizes deviations from construction and

building restrictions and is subject to the less stringent standard of demonstrating that "practical difficulties" exist. The use variance on the other hand, allows land uses for purposes other than those permitted in the district as prescribed in the pertinent regulation. Thus, to be granted a use variance, the applicant must show that the current zoning ordinance creates an unnecessary hardship. The present case involves both area and use[5] variances; therefore, both the unnecessary hardship and practical difficulties standards are applicable.

(a) Unnecessary hardship:

There is not one case in Ohio which sets forth exclusive standards for a use variance and specifically, unnecessary hardship. *1415 Kenilworth, LLC v. City of Cleveland*, 8th Dist. Cuyahoga No. 111249, 2023-Ohio-300. The City has codified the standards that allow the Board of Zoning Appeals to grant a variance under Section 329.03. The Board must weigh the evidence and factors presented to determine if unnecessary hardship has been demonstrated for a use variance. In the present case, the Board did find unnecessary hardship existed for the use variance sought by LMM. The BZA resolution dated March 13, 2023, clearly indicated that "Whereas, Local conditions and evidence presented the Board in granting relief from practical difficulty and unnecessary hardship caused by strict compliance with specific provisions of the zoning ordinances." (BZA Resolution; Calendar No 22-213, page 2)

Unnecessary hardship necessarily admits that there is some use for the land, but that use works an unnecessary hardship on the landowner. *Kurtock v. Cleveland Bd. of Zoning Appeals*, 8th Dist. Cuyahoga No. 105755, 2017-Ohio-8890. Generally, "Whether a hardship or exceptional or extraordinary circumstances exist to justify the issuance of a variance is a question of fact to be

[5] Record of Appeal, page 59; Re: Appeal of 5/13/22 Notice of Non-Conformance, 4100 Franklin Blvd. Site/Zoning Application B22009273 (Applicant), Page3

determined by the zoning board or commission[6]."

The Board must determine if the granting of the use variance will adversely affect the rights of adjacent property owners, if the variance sought is the minimum which would afford relief to the applicant, if the variance requested stems from a condition which is unique to the property at issue and not ordinarily found in the same zone or district, etc.

Testimonies throughout the hearing showed that "there are a number of more intensive uses than one and two families, frankly a number of uses are far more intensive than the proposed use or the previous use of the LMM property." (BZA Transcript, P.10) Further, the record of appeal evidence that LMM decided that "in alignment with requests from Councilman Kerry McCormack and feedback from the community, there will be no 24/7 operations at this location at any point. "LMM's" commitment to being a good neighbor and establishing a much-needed resource in this location is most important. LMM will not compromise the relationships built and will have no future discussion of 24/7 operations at 4100 Franklin." (Record of Appeal, Page 83) Further, testimonies throughout Board hearing emphasized that the use variance will not affect the rights of the neighbors. Nonetheless, LMM submitted to the board a security plan and agreed to the board's conditions. These conditions were that "the hours of operation will be 9am to 7pm (as opposed to twenty-four hours per day, seven days per week), no person will be permitted to stay in the facility overnight, no loitering, LMM will provide transportation off site after services have been rendered. LMM also submitted the details of the security plan to the BZA on February 20, 2023. These conditions and security plan were extra measures to essentially ensure that in granting the variance the rights of adjacent property owners are not adversely affected.

[6] *Kurtock v. Cleveland Bd. of Zoning Appeals*, 8th Dist. Cuyahoga No. 105755, 2017-Ohio-8890

The Appellant argues in his third assignment of error that "an unnecessary hardship does not exist unless a property cannot be used for any permitted use under the current zoning" (Appellee Brief, P. 22) It is true that determining whether there is other economically viable use which is permitted in zoning district is not solely a matter of whether the property owner can make some profit as opposed to the most profit. Property owners are nonetheless allowed to more than just a reasonable return on their investment. Here, the Property has been used for services like the proposed use variance howbeit below its capacity over the last few years. LMM should be allowed a reasonable return on the use of property. LMM began working in partnership with Lutheran Family Services (LFS) in 2014 and LFS merged with LMM in 2017[7]. Since the merger, the focus of services at the Property has been behavioral health services, case management, benefits assistance, and counseling, education and support groups for individuals, youth and families. (Record of Appeal, Page 142) However, "LMM staff report that the COVID-19 pandemic in 2020-2021 significantly affected operations at the Property since this was among the facilities .... in anticipation of beginning to operate the Center by the end of 2022. After receiving the Notice of Non-Conformance in May 2022, the usage of the building has been lower than its pre-pandemic level in anticipation that the use of the building for the Center will ultimately be approved[8]." Thus, by this variance, LMM would make more reasonable use of the property than it currently is and reach out in service to many young people who are in dire need of its anticipated services.

Further, the Appellant argues that LMM seeks the variance because "LMM will receive a significant financial benefit if it receives a variance for the Property which is not a ground for "unnecessary hardship" [9]. That is untenable. LMM is a non-profit organization thus, financial gain

[7] Record of Appeal, Page 197
[8] Record of Appeal, Page 142
[9] Page 25, Appellant's brief

is not its ultimate focus in decision making although there are financial implications in the grant or otherwise of the variance. For example, the variance will affect local jobs, and certain charitable contributions to LMM. However, testimonies and support letters evidence that LMM chose the Property and thus seeks the variance for reasons of safety, accessibility by public transit, access to amenities that any young person would want- cafes, libraries, shops, etc., the property's closeness to downtown and the size of the building. (Record of Appeal, Page 202) And also because "every youth should access to a safe space and because the YDIC will close the gap of Cleveland being the only major urban area in Ohio without this service." LMM has estimated that about seventy percent (70%) of the guests at the Center will be racial minorities and a significant number will be members of the LGBTQ community. (Record of Appeal, P. 266, BZA Transcript, P. 53). Further, the support letter of Barbara Daly, PHD, RN, affirmed that the YDIC will benefit "the entire community in many ways." These include that "the Youth Drop-In Center provides a tremendous opportunity to create deeper relationships and opportunities in the neighborhood for guests at the Center as well as community-based organizations." (Record of Appeal, P. 317) Also, as indicated in her support letter, property owner Emily Henehan stated "There should be no neighborhood, no street, that is not appropriate for the children of our community to come and get some help.[10]"

The Appellant also argues[11] that "LMM offered no evidence of unnecessary hardship peculiar to the property that is not shared by other premises in the district" as such LMM did not meet the burden of showing "unnecessary hardship", - that is inaccurate. There is ample evidence that LMM's hardship is peculiar. LMM's office Property is uniquely located in a two-family residential district. LMM has been in the residence since 1971[12] whereas the Appellant, has only

[10] Record of Appeal, Page 554, Property Owner 3803 Clinton Ave
[11] Page 21, Appellant's brief
[12] Records from the Ohio Secretary of State Business Search show that at its incorporation in 1971, LMM''s office was 4100 Franklin Building

been in his one-family residence since 2004 when he acquired his interest. At the time of incorporation in 1971, the district of the premises was a multi-family district. LMM has been in use of the premises even in 1971 when it was a multi-family district. This situation can be distinguished from the situation in *Consol. Mgt., Inc. v. Cleveland*, 6 Ohio St.3d 238, 452 N.E.2d 1287 (1983) where the purchaser of the premises acquired the premises with knowledge of the zoning restrictions and thus created his own hardship. Here, as iterated above, the peculiarity here is that the Appellee did not create this hardship and the property is an office. LMM and its predecessor have been in the Property since 1971. The case here can also be distinguished from *Kurutz v. City of Cleveland*, 8th Dist. Cuyahoga No. 105899, 2018-Ohio-2398, where the court "concluded that it was "**a rare case where there was no evidence** at all to support the court's finding that there was reliable, probative and substantial evidence to support the board's decision to grant the use variance." (emphasis added) Here there is ample evidence to support BZA's finding. Also, in *Kurutz* id the Company bought the building in May 2011 whereas the ordinance was enacted prior. Here, there is evidence that the Appellee has been in use of the Property since 1971 before the 1985 zoning variance. Again, the case here can be distinguished from *6957 Ridge Rd., L.L.C. v. City of Parma*, 8th Dist. Cuyahoga No. 99006, 2013-Ohio-4028. There, the court held that "the owner of a property could not claim that the residential zoning of a property he purchased created an unnecessary hardship that entitled him to a zoning variance because the owner purchased the property with full knowledge of the residential zoning status." Here by reason of the merger in 2017, LMM acquired the property in 1975, because the merger was a structural business change; LFS merged into LMM[13]. In a merger "the absorbed company becomes a part of the resulting company following a merger and the merged company has the ability to enforce

[13] BZA Record of Appeal, Page 641

agreements as if the resulting company has stepped in the shoes of the absorbed company." *JPMorgan Chase Bank, NA v. Carroll*, 12th Dist. Clinton No. CA2013-04-010, 2013-Ohio-5273. Lutheran Family Services, which owned the property since 1975 was absorbed and integrated by LMM and thus, LMM stepped into the shoes of Lutheran Family services with regards to the property. There is there for evidence that LMM's hardship is peculiar, and denial of the variance will cause unnecessary hardship.

(b) Practical Difficulties

In determining whether an area zoning variance should be granted, the applicant must establish that denial of the variance would cause "practical difficulties." *Kisil v. Sandusky* (1983), 12 Ohio St. 30, 34. *1415 Kenilworth, LLC v. City of Cleveland*, 8th Dist. Cuyahoga No. 111249, 2023-Ohio-300.

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 the use of their property. *Duncan v. Middlefield* (1986), 23 Ohio St. 3d 83. "Caselaw instructs that a property owner seeking an area variance must establish that without the variance, it would encounter practical difficulties such that application of the zoning ordinance to the property is inequitable. Board of Zoning Appeals are instructed to weigh the competing interests of the property owner and community, and the property owner would be required to show that the application of an area zoning requirement was inequitable" *1415 Kenilworth, LLC v. City of Cleveland*, 8th Dist. Cuyahoga No. 111249, 2023-Ohio-300.

Here, LMM applied for an area variance to install an outdoor vestibule and patio connected to the rear of the building at the property[14]. Attorney Ockner argued in his notice of appeal, "a practical difficulty "inheres in and is peculiar" to the property because of its long-established size and the location of the building on it vis-à-vis nearby residential properties. The building cannot be moved, nor can the property that is less than 30 feet away from the building. As such, strict application of the Code creates a practical difficulty not generally shared by other land or buildings in the same district[15]." The Board therefore found practical difficulty existed and granted the area variances requested by LMM.

In *Phillips v. City of Westlake Bd. of Zoning Appeals*, 8th Dist. Cuyahoga No. 92051, 2009-Ohio-2489 the courts found that "A preponderance of reliable, probative, and substantial evidence supported the trial court's decision because (1) applicable zoning regulations complied with the essential spirit of the Duncan factors, even though they were not identical to those factors, (2) the BZA did not have to consider every Duncan factor, as they were non-exclusive, rather than mandatory. *Phillips v. City of Westlake Bd. of Zoning Appeals. Id.* Similarly as in *Phillips*, there is "a preponderance of reliable, probative, and substantial evidence supported the BZA's decision because (1) applicable zoning regulations complied with the essential spirit of the Duncan factors, even though they were not identical to those factors."

Duncan lists seven (7) factors to be considered and weighed to determine whether a property owner has encountered practical difficulties. No single factor controls 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

[14] BZA Transcript. Page 56

[15] Record of Appeal, page 63; Re: Appeal of 5/13/22 Notice of Non-Conformance, 4100 Franklin Blvd. Site/Zoning Application B22009273 (Applicant), Page7,

83. *1415 Kenilworth, LLC v. City of Cleveland*, 8th Dist. Cuyahoga No. 111249, 2023-Ohio-300. Consequently, a variance may be granted even if some factors weigh in favor of a landowner or are inconclusive. *Id.* When reviewing the record before this court, it can be shown by probative evidence that a number of these factors weigh in favor of LMM. The *Duncan* factors are:

i. Whether the property in question will yield a reasonable return or whether there can be any beneficial use of the property without variance.

ii. Whether the variance is substantial.

iii. Whether the essential character of the neighborhood would be substantially altered or whether adjoining properties would suffer substantial detriment because of the variance.

iv. Whether the variance would adversely affect the delivery of governmental services (e.g., water, sewer, garbage, etc.).

v. Whether the property owner purchased the property with knowledge of the zoning restrictions.

vi. Whether the property owner's predicament feasibly can be obviated through some method other than a variance

vii. Whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting a variance.

The Duncan factors consist of non-exclusive factors; they are **not mandatory** ones. The "key to this standard" is whether the area zoning required is reasonable. *Id.* However, 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** (emphasis added). *Duncan.* Id.

Further, the Appellants argue that none of the seven factors enumerated in *Duncan*, discussed infra, were considered by the Board when they granted LMM's request for the area variances[16]. No single factor controls 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. From the spirit of the ordinance vis-a-vis the hearing the Board discussion; the Board's decision was in the spirit of a number of *Duncan* factors.

i. Whether the variance granted is substantial.

Each variance must be reviewed on its own specific facts and circumstances. Here the variances granted by the BZA are by no means substantial and will not adversely affect the character of the neighborhood nor the rights of the neighbors. LMM sought only a 3.8%[17] enlargement or expansion of the existing structure, which enlargement would not have brought the building closer to adjoining properties. Ohio courts routinely consider the numerical percentage of deviation caused by a proposed variance in determining whether it is substantial. *Stovall v. City of Streetsboro*, 11th Dist. Portage No. 2006-P-0077, 2007-Ohio-3381

There is no magic number as to what constitutes a substantial variance. The Board is afforded discretion to weigh all factors to determine if any exception to the zoning code is merited. Here, the Board did not find the area variance to be so substantial that it should be denied. After careful consideration, the Board determined that the area variances requested by LMM should be granted. This factor thus weighs in favor of LMM.

[16] Appellant's Brief, P 32
[17] BZA Record of Appeals, Page 141, The physical dimension of the building will increase by 3.8% from 4255 to 4418s.f.

ii. Whether the essential character of the neighborhood would be substantially altered, or adjoining properties would suffer a substantial detriment.

The essential character of the neighborhood will not be substantially altered with the variances being granted. The current housing in this area consists of single-family houses, two-family houses, a nursing home, and the "Most Haunted House in Ohio- Franklin Castle, among others. It is true that the proposed variance would increase the number of people who ply that road of Franklin Blvd. However, testimonies throughout the board hearing evidenced that the character of the neighborhood would not be substantially affected[18]. Further, LMM has over the years revised the proposed hours of operation, and even submitted a security plan to the Board as an extra superfluous measure to ensure that the character of the neighborhood would not be substantially altered, nor adjoining properties suffer substantial detriment.

Based on the foregoing, the evidence in the record overwhelmingly supports the conclusion that granting the variances in this case will not substantially alter the essential character of the neighborhood.

iii. Whether the variance would adversely affect the delivery of governmental services.

There is nothing to indicate that the granting of the Variances will adversely affect the delivery of governmental services such as water, sewer, or garbage. The key word here is "adversely" affect the delivery of governmental services such as water, sewer or trash. Undoubtedly, there would be an increase of water and sewer usage and trash services if the YDIC is commenced. However, the expansion of existing water and sewer usage for the proposed YDIC would not adversely affect the delivery of governmental services in the neighborhood. The Ohio Supreme Court in *Duncan* did not require that all factors had to be present in every case. In fact,

[18] BZA Record Transcript, p. 246, Tr. P. 33

the court in *Duncan* never discussed whether the variances in *Duncan* would adversely affect the delivery of government services. Furthermore, the Appellant's argument under this factor that there will be an increase in the crime rate is prejudiced and unsupported. Rather, the YDIC has the tendency to offer hope and opportunities[19] for young people who could have otherwise been susceptible to vices to live a better and self-determined life. Thus, the granting of the Variances will not adversely affect the delivery of governmental services.

iv. Whether the property owner purchased the property with knowledge of the zoning restrictions.

The Appellant argues that LMM knew of the zoning restrictions when they acquired the property and therefore, should not be granted a variance.

Even if LMM knew of the zoning code 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." "In fact, knowledge of the restriction upon purchase of a property does not preclude regulatory "takings" claim under the 5th Amendment, a claim that could be pursued if the variances are denied." *Palazzlo v. Rhode Island*, 533 U.S. 606 (2001).

Moreover, LMM did not purchase the property with knowledge of the zoning restrictions. As discussed, the Property was initially occupied by Lutheran Metropolitan Ministry Association of Greater Cleveland in 1971. The Lutheran Metropolitan Ministry Association of Greater Cleveland changed its name to Lutheran Metropolitan Ministry (LMM) in 1999. LMM over the years merged with four other entities including Lutheran Children's Aid Services (nka Lutheran Family Services). As such the merger gave LMM the rights of its integrated entity- Lutheran

[19] BZA Record of Appeal, Page, Testimony by Raymond Charles Klimczak

Family Services. Thus, even if Lutheran Family Services owned the property at the time of the zoning ordinance in 1985, LMM by reason of the merger[20] and because it remained as the sole surviving entity acquired the interest and powers of Lutheran Children's Aid Services which property interests' dates to the year of 1975. The mergers in 2017 and 2020 were structural business changes and did not extinguish nor create a new LMM entity *per se* but rather made LMM the surviving entity by integrating the other entities into extinction. In a merger, "the absorbed company becomes a part of the resulting company following a merger and the merged company has the ability to enforce agreements as if the resulting company has stepped in the shoes of the absorbed company." *JPMorgan Chase Bank, NA v. Carroll*, 12th Dist. Clinton No. CA2013-04-010, 2013-Ohio-5273. Thus, LMM did not purchase the property with knowledge of the zoning restrictions; this factor is in favor of LMM.

v. Whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting a variance.

Zoning codes are designed to regulate the use of land, buildings and structures to promote 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. LMM's variance may not be precisely compliant with the zoning code in every sense, but it is generally in the spirit and intent of the zoning requirements.

The "Purpose and Intent of Zoning code", Zoning codes are designed to regulate the use of land, buildings, and structures to promote public health, safety, and general welfare. Here the code

[20] *Midfirst Bank v. Cicoretti*, 7th Dist. Mahoning No. 22 MA 0074, 2023-Ohio-3599 citing *Asa Architects v. Schlegel*, 75 Ohio St.3d 666, 665 N.E.2d 1083 (1996)

provides under §337.02 (g) that " In a One-family District, Charitable institution buildings and uses and their accessory buildings and uses are permitted, if approved by the Board of Zoning Appeals after public notice and public hearing, and if adequate yard spaces and other safeguards to preserve the character of the neighborhood are provided, and if in the judgment of the Board such buildings and uses are appropriately located and designed **and will meet a community need without adversely affecting the neighborhood**." Pursuant to §337.02 (g) (3)(G) however, such Charitable Institutions should be "located not less than thirty (30) feet from any adjoining premises in a Residence District not used for a similar purpose, and subject to the review and approval of the Board of Zoning Appeals as stated above:" Here, as gleaned from the record, there are other charitable institutions in the district such as St. Herman House, 4410 Franklin Blvd, Cleveland, Ohio, 44113. As such, there is no significant character change in the restricted district by the grant of the variance. It does not appear that the intent and purpose of the zoning provision is to exclude a Youth-Drop-In-Center entirely. Also, the grant of the variance will not alter the character of the neighborhood, nor be contrary to the intent of the zoning code. If it were, there would be no similar charitable institutions. As such the grant of the variance was substantial justice to LMM. The spirit and intent behind the zoning code does not exclude such variances as proposed by LMM.

Further, LMM may not be precisely compliant with the zoning code in every sense, but they are generally in the spirit and intent of the zoning requirements. LMM has demonstrated its willingness to comply with the Board's conditions to ensure the spirit and intent of the zoning ordinance complied with. The Appellants have not provided any convincing evidence that the variances requested by LMM are contrary to the needs of the public health, morals, welfare or public safety. The Appellants have not submitted sufficient evidence that demonstrates that granting the variance would be inconsistent with the spirit and intent of these zoning provisions.

Based on the testimonies and evidence, the Board found that granting the area variances would not be contrary to the intent and purpose of the Zoning Code for all the reasons outlined in their Resolution.

Consequently, the above factors weigh strongly in favor of LMM. It is trite law that a variance may be granted even if some factors weigh in favor of a landowner or are inconclusive as is the case here. *Duncan v. Middlefield* (1986), 23 Ohio St. 3d 83. Here, several of the factors weigh in favor of LMM. The denial of the variance will therefore lead to practical difficulties.

2. Deprivation of substantial property rights

The Board's Resolution states, "Refusal of this appeal could deprive the owner of substantial property rights.[21]"

"A zoning board or planning commission which is given the power to grant variances is vested with a wide discretion with which the court will not interfere unless that discretion is abused.[22]" *1415 Kenilworth, LLC v. City of Cleveland*, 8th Dist. Cuyahoga No. 111249, 2023-Ohio-300. Here in exercising this discretion, the Board's Resolution lists the reasons for the Board's decision to grant the variance. Thus, the Resolution specifically states, "Refusal of the variance would deprive the owner of substantial property rights and create a practical difficulty." (Record of Appeal, P. 773) Unlike *1415 Kenilworth, LLC v. City of Cleveland*, 8th Dist. Cuyahoga No. 111249, 2023-Ohio-300 where the court recognized that "some courts have declined to find that substantial; properties are deprived when the hardship is self-inflicted", as the evidence overwhelmingly supports the case at bar: here there is evidence that the hardship is not self-inflicted.

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[21] Record of Appeal, Page 30

[22] *Kurtock v. Cleveland Bd. of Zoning Appeals*, 8th Dist. Cuyahoga No. 105755, 2017-Ohio-8890

The Appellant argues in Assignment of Error No. 5[23] that LMM acquired its interest in the Property in the year 2017- over thirty (30) years after Cleveland enacted the current zoning as such, any economic hardship would have been self-inflicted, thus, the Board should have declined to find that substantial property rights are deprived when the hardship is self-inflicted. **That is inaccurate.**

Since 1971, Lutheran Metropolitan Ministry Association of Greater Cleveland now LMM has been resident in the Property at address was 4100 Franklin Boulevard, Cleveland, Ohio, 44113. The Property was acquired by Lutheran Child Aid Society, later known as Lutheran Family Services (LFS) in 1975. At the time of acquisition, the district was a multi-family zoning district. In 1985 when the impugned zoning ordinance was passed, Lutheran Metropolitan Ministry Association of Greater Cleveland resided in the premises. LFS, however, owned the Property as at 1985. In 1999, Lutheran Metropolitan Ministry Association of Greater Cleveland changed its name to Lutheran Metropolitan Ministry (LMM). LMM has continued to use the premises for its services. In 2017 LMM merged Community re-entry Inc. out of existence, leaving LMM as the surviving entity. Again in 2017 LMM merged with Lutheran Family Services out of existence, leaving LMM as the surviving entity. In 2020 LMM merged with Lutheran Metropolitan Properties, LLC out of existence, again, leaving LMM as the surviving entity. LMM merged with LMM Leveraged Lender, LLC, out of existence, leaving LMM as the surviving entity. The change of name and the mergers over the years did not change LMM and LFS in relation to the acquisition of the property[24]. In *JPMorgan Chase Bank, NA v. Carroll*, 12th Dist. Clinton No. CA2013-04-010, 2013-Ohio-5273, it was observed that in a merger, "the absorbed company becomes a part of

[23] Appellant Brief, page 6, 25, 26

[24] In *JPMorgan Chase Bank, NA v. Carroll*, 12th Dist. Clinton No. CA2013-04-010, 2013-Ohio-5273, it was observed that in a merger, "the absorbed company becomes a part of the resulting company following a merger and the merged company has the ability to enforce agreements as if the resulting company has stepped in the shoes of the absorbed company."

the resulting company following a merger and the merged company has the ability to enforce agreements as if the resulting company has stepped in the shoes of the absorbed company." As such, LMM continues to have powers and liabilities of Lutheran Family Services. Thus, even if Lutheran Family Service owned the property at the time when the zoning ordinance was passed in 1985, LMM still arguably acquired interest in the property before 1985 because of the merger. *JPMorgan Chase Bank, NA v. Carroll*, 12th Dist. Clinton No. CA2013-04-010, 2013-Ohio-5273. It does not therefore lie with the Appellant to now argue that LMM acquired the interest in 2017.

Further, LMM established that the denial of the variance would deprive them of substantial property rights, a condition required under C.C.O. § 329.03(b)(2) because as argued in his appeal to the BZA, Attorney Ockner averred that "denying the variance will deprive LMM of substantial property rights since the proposed use is for "Charitable Institutional uses" like those already offered on the Property, such that denying the variance would be wholly arbitrary. Denying LMM's proposed use (by denying a variance to the extent one is needed, or otherwise) would certainly raise the specter that was improperly based, at least in part, on the fact that the Center is intended to help young people experiencing homelessness or housing instability[25]."

For the above reasons, Board properly granted the variances requested by the Appellees. If the decision of the Board is reversed, the appellee will be deprived of substantial property rights to utilize it in the most conducive way.

3. Purpose and intent of the zoning code

Zoning codes are designed to regulate the use of land, buildings, and structures to promote public health, safety, and general welfare. The Ohio Supreme Court has held that a zoning

[25] Record of Appeal, page 63; Re: Appeal of 5/13/22 Notice of Non-Conformance, 4100 Franklin Blvd. Site/Zoning Application B22009273 (Applicant), Page7,

regulation is presumed to be constitutional "unless determined by a court to be 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 Heights City Council* (1998), 81 Ohio St.3d 207.

The Board's Resolution states, "granting the appeal will not be contrary to the purpose and intent of the Zoning Code." (Record of Appeal, P. 773) The Appellee concurs.

Cleveland Code of Ordinance §337.03 (b) provides that "in a two-family district, all other uses permitted and as regulated in a One-district family are permitted." §337.02 (g) provides that " In a One-family District, Charitable institution buildings and uses and their accessory buildings and uses are permitted, if approved by the Board of Zoning Appeals after public notice and public hearing, and if adequate yard spaces and other safeguards to preserve the character of the neighborhood are provided, and if in the judgment of the Board such buildings and uses are appropriately located and designed and will meet a community need without adversely affecting the neighborhood." Pursuant to §337.02 (g) 3)(G) however, such Charitable Institutions should be "located not less than thirty (30) feet from any adjoining premises in a Residence District not used for a similar purpose, and subject to the review and approval of the Board of Zoning Appeals as stated above:" There is not much dispute that LMM intends to use the property for Charitable purposes and that same had been subject to the review and approval of the board. In his report[26], Professor Alan Weinstein, asserted that "because the proposed use will provide, on a charitable basis, food and clothing, bathing and clothes-washings facilities; and various counseling services to individuals in need of those goods, facilities and services, it meets the definition of "charitable institution" as properly understood within professional planning practice." Further Professor Allan

[26] Expert Report of Alan Weinstein, BZA Record of Appeal, Page 138

Weinstein's testimony at the Board hearing evidenced that "there are a number of more intensive uses than one and two families, frankly a number of uses are far more intensive than the proposed use or the previous use of the LMM property. Just very briefly; at 3801 Franklin is the Eleanor, almost an eight thousand square foot apartment building with eight units; at 3806 Franklin, The Stone Gables Inn, nine thousand square foot, small boutique hotel; at 4210 Franklin Saint Herman's, a 43 hundred square foot building operated as a youth hospital; at 4308 Franklin, the Franklin Castle, a 77 hundred square foot structure that offers overnight accommodations and tours for up to 12 visitors every Tuesday, Wednesday, and Thursday night from 5:45 to 7:00; at 4312 Franklin, Saint Herman's House, a 27 hundred square foot shelter offering emergency, a building offering emergency shelter; at 4427 Franklin, Saint Paul's Community Church which is part of its ministry has an outreach center for those in need. In addition to those uses which are all on the block where the LMM building is located, directly across West 38th Street is Franklin Plaza. At 3600 Franklin Boulevard, a 218-unit 85 thousand square foot convalescent hospital with on-site parking for more than 50 cars" (BZA Transcript, P.10 &11). If the purpose and intent of the zoning provision was to exclude LMM's proposed use variance, then there would not be more intense uses of property in the district. The dispute, however, is that the property is located less than 30 feet distance from adjoining premises. And that is the variance sought.

Under Cleveland Code of Ordinance §329.03(d)(l), "The Board may permit, in any use district, the extension of a building or use existing on the effective date of the use regulations of the area, into adjoining land in a more restricted district, which land was under the same ownership on the effective date, under such conditions as will safeguard the character of the more restricted district." Here, it appears that LMM's variance falls on the section[27]. The Property is already

[27] CCO §329.03(d)(l)

present in the district, and the district characterized by properties with similar uses as the proposed variance, as such the use will not distort the character of the district and a COO has been granted for that use[28]. LMM and its absorbed predecessors have always used the Property for office and charitable services which LMM by this variance seeks to continue to use for charitable services for a "discrete group of vulnerable youths and young adults in need of those services.[29]" Also, as argued above, LMM, Lutheran Metropolitan Ministry Association of Greater Cleveland and Lutheran Family Services are essentially the same entity with LMM now in its place. LMM integrated Lutheran Family Services by the merger[30] which merger grants LMM the rights of Lutheran Family Services, thus, it is arguable that at the effective date of the zoning variance in 1985, LMM was the owner as it is also now because Lutheran Family Property had the property interest at the time. In *Midfirst Bank v. Cicoretti*, 7th Dist. Mahoning No. 22 MA 0074, 2023-Ohio-3599, it was held that "in a merger of two companies, the absorbed company becomes a part of the resulting company following merger. A merger involves the absorption of one company by another, the latter retaining its own name and identity, and acquiring the assets, liabilities, franchises and powers of the former." Thus, in acquiring Lutheran Family Services, LMM stepped into the shoes of its predecessors including the shoes as though it had the property since 1975. Also, the variance was with such conditions as will safeguard the character of the district. Thus, the proposed usage by LMM will not be against the purpose and intent of zoning code.

Further, as discussed above, there are also other charitable institutions in the district such as St. Herman House, 4410 Franklin Blvd, Cleveland, Ohio, 44113. As such, there is no significant character change in the restricted district, i.e., Franklin Boulevard. It does not appear that the intent

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[28] Record of Appeal, page 63

[29] Record of Appeal, page 60; Re: Appeal of 5/13/22 Notice of Non-Conformance, 4100 Franklin Blvd. Site/Zoning Application B22009273 (Applicant), Page4,

[30] *JPMorgan Chase Bank, NA v. Carroll*, 12th Dist. Clinton, No. CA2013-04-010, 2013-Ohio-5273

and purpose of the zoning provision is to exclude a Youth-Drop-In-Center entirely, and the grant of the variance will not alter the character of the neighborhood. Nor be contrary to the intent of the zoning code.

In summary, LMM established all the conditions required under Cleveland Codified Ordinance §329.03(b) (1), (2) and (3). As a result, the Board possessed the power to grant a variance and therefore properly granted the variances requested. LMM's variance entails no change in the use of property for a charitable institution, or the location of the building area.

4. The City Properly Granted Area Variance

CCO §329.03(e)(2) provides that "The Board may permit such modification of the regulations affecting yard and court dimensions as may be necessary to permit the use of an existing building for a purpose for which such regulations require greater yards or courts than those existing on the premises, provided the Board determines that such existing yards or courts will provide adequate light and ventilation for the spaces lighted or ventilated thereby and will not tend to create an unhealthful or unsanitary condition under the proposed conditions of arrangement, use and occupancy. Here, LMM sought an area variance to construct a vestibule at the back of the premises, which is essentially a 3.8%[31] enlargement or expansion of the existing structure. The requested variance was thus minimal and does not impede the light or ventilation thereto. Therefore, this area variance was properly granted to the extent that, and it is the case that "such existing yards or courts will provide adequate light and ventilation for the spaces lighted or ventilated thereby and will not tend to create an unhealthful or unsanitary condition under the proposed conditions of arrangement, use and occupancy."

[31] BZA Record of Appeal, Page 141

5. The City Properly Granted the Distance Variance

Under C.C.O. §329.03(g), "The Board may vary the required distance from property in a residence district specified in Sections 335.02, and 337.01 to 337.23 where such variance will not adversely affect the neighborhood, or the safety, health and general welfare of the occupants of the building, provided proper notice of the proposed variance has been given to the owners of the property on the same street and those in the same block within a distance of two hundred (200) feet from the premises of the proposed use, and a public hearing has been held." Here, as argued above, LMM sought a 3.8% enlargement or expansion of the existing structure, which enlargement would not have brought the building closer to properties[32]. "The work on the front will not lessen the distance between the building and the Franklin Boulevard right-of-way, or between the building and parcels to the east or west of Property.[33]" Also, notices were given to owners of property on the street and a public hearing held on February 6, 2023. Further, on February 20, 2023, as an extra measure by LMM to ensure that the Project when executed will not adversely affect the neighborhood, or the safety, health and general welfare of the occupants of the building, LMM submitted a security plan to the BZA. Thus, the distance variance was properly granted.

CONCLUSION

It is well established that in reviewing a decision of an administrative board, the courts will presume that the decision is reasonable and valid. *Wade v. City of Cleveland,* (8th Dist. 1982) 8 Ohio App.3d 176, 178. In the absence of evidence that the decision was an abuse of discretion, or

[32] See, Report by Alan Weinstein, Record of Appeal, page 145, Page4,
[33] Record of Appeal, Page 61

an act in excess of the power of the board, or unreasonable under all the circumstances, the board's decision will be upheld. *Id.*

The Board's power to grant a variance is limited to specific cases where the person seeking the variance has established all three conditions under Cleveland Codified Ordinance 329.03(b). The "whole record" reveals that LMM presented sufficient evidence to meet each of the standards. Accordingly, the Board's decision to grant the Appellant's variance requests was supported by a preponderance of reliable, probative and substantial evidence. "An appellate court can only reverse an administrative appeal (as is the case here) based on evidentiary arguments if we conclude there **is no** evidence in support of the agency's decision." *1415 Kenilworth, LLC v. City of Cleveland*, 8th Dist. Cuyahoga No. 111249, 2023-Ohio-300. Here, there is evidence to support the Board's decision. The Appellant failed to show a reversible error. For all of the reasons stated above, the City requests that this Court affirm the Board's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Brief was filed at the Cuyahoga Court of Common Pleas and sent by email to counsel for all parties on the 6th day of November 2023.

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