[Cite as *Greenfield v. Schluep,* 2008-Ohio-2372.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

CITY OF GREENFIELD,	:	
Plaintiff-Appellee,	:	Case No. 07CA9
vs.	:	
GARY SCHLUEP, et al.,	:	DECISION AND JUDGMENT ENTRY
Defendants-Appellants.	:	

APPEARANCES:

COUNSEL FOR APPELLANTS: James A. Kiger, Kiger & Kiger, 132 South Main Street, Washington Court House, Ohio 43160

COUNSEL FOR APPELLEE: Jon C. Hapner, Hapner & Hapner, 127 North Street, Hillsboro, Ohio 45133

DATE JOURNALZIED: 5-7-08

ABELE, P.J.

{¶ 1} This is an appeal from a Highland County Common Pleas Court judgment in favor of the City of Greenfield, plaintiff below and appellee herein. Gary Schluep and Gary Lyons, defendants below and appellants herein, assign the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED AS A MATTER OF OHIO LAW IN ISSUING A PERMANENT INJUNCTION AGAINST APPELLANTS WHICH PERMANENTLY BARRED THEM FROM ALL USE OF THEIR REAL PROPERTY."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN SUBSTITUTING ITS JUDGMENT FOR THE JUDGMENT OF THAT OF THE PLANNING COMMISSION - BOARD OF ZONING APPEALS AND THE COUNCIL OF THE CITY OF GREENFIELD."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT SHIFTED THE BURDEN OF PROOF ERRONEOUSLY FROM APPELLEE (PLAINTIFF) TO APPELLANTS (DEFENDANTS)."

FOURTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT THE LAW DIRECTOR HAD A CONFLICT OF INTEREST BY BRINGING AN UNAUTHORIZED LAWSUIT AGAINST APPELLANTS AND THEREAFTER FAILING TO DISMISS SUCH ACTION, AND IMPOSE SANCTIONS AGAINST THE LAW DIRECTOR FOR HIS CONDUCT."

{¶ 2} On April 7, 2003, appellants entered into a contract to purchase a vacant lot at 714 Jefferson Street for $27,000. Appellants intended to build a multi-family apartment complex on the premises. The sale closed on June 6, 2003. Shortly thereafter, appellants applied for a zoning variance and building permits to start construction.

{¶ 3} On June 19, 2003, the "Planning and Zoning Committee" (P&Z) voted unanimously to "allow the project."[1] Two months later, the City Law Director[2] notified the Greenfield City Council that serious "procedural and substantive problems" arose in

[1] Appellant Gary Schluep is a member of P&Z and abstained from voting on the measure. The remaining members voted unanimously in his favor.

[2]Conrad Curren, Greenfield City Law Director, owns property adjacent to appellants' lot.

the manner in which the city handled its zoning matters.[3] Nevertheless, on September 17, 2003 the City Council approved appellants' project.

{¶ 4} On December 2, 2003, the City Law Director, on behalf of the City, filed the instant action and requested a temporary and permanent injunction because, he argued, that construction of the multi-family apartment building would violate city zoning. The trial court issued a temporary restraining order that halted the proposed construction and, on December 22, 2003, issued a preliminary injunction.

{¶ 5} Appellants denied liability and asserted a number of defenses. Later they filed a "cross claim and third party complaint" and asked, inter alia, that their "variance" be deemed valid and enforceable, that the City Law Director be deemed to have a conflict of interest in the case and that they be awarded damages in excess of $99,000, together with attorney fees, to compensate for the "defense of their rights" under the City's zoning laws. The City denied liability on the cross-claim/third party complaint and asserted a variety of affirmative defenses.[4]

{¶ 6} The matter came on for trial on March 12, 2007. At trial, the evidence was uncontroverted that the City's procedure for handling zoning matters was flawed. Furthermore, the evidence revealed that although both P&Z and City Counsel approved the project, no indication existed that a "Board of Zoning Appeals" ever passed on it,

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[3] Little testimony was adduced as to these purported flaws, but they apparently include, among others, the absence of a "Board of Zoning Appeals" to consider variance requests.

[4] We note that this case was previously before us for an interlocutory appeal of a summary judgment on the issue of political subdivision immunity. See e.g. Greenfield v. Schluep, Highland App. No. 05CA8, 2006-Ohio-531. Because that issue has no bearing on the present appeal, we need not discuss those proceedings again.

and no formal, written, variance was issued to appellants.

{¶ 7} The trial court rendered a decision on June 26, 2007.[5]

{¶ 8} The court found that the "variance" was improperly granted and, consequently, made the injunction permanent. This appeal followed.

I

{¶ 9} Appellants assert in their first assignment of error that the trial court's judgment deprives them of "all use of their real property." We disagree with appellants' assertion.

{¶ 10} Although the December 22, 2003 preliminary injunction enjoined appellants from "building on the property" and the July 19, 2007 order made that injunction permanent without explicitly providing that it only applied to the original project and only if appellants had no variance, the trial court's judgment must be interpreted in light of the facts of the case. We do not construe the judgment as barring all construction on the lot. Rather, the judgment bars construction of the original project and, even then, only without a properly granted variance. Appellants may seek another variance for that construction project. Further, Appellant Gary Lyons testified that he and his partner had alternate plans to construct a smaller building on the lot for which they would not need a variance. Obviously, they are free to pursue that project.

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[5]Before it turned to the merits of the case an understandably exasperated trial court made the following observation:

> "This hyper-litigated conflict has been w[i]nding its way through the courts since 2003. * * * {T]his matter could have been disposed of simply and cheaply years ago by the defendants' filing a new application for variance, and with the City's carefully following proper procedures. But, the joys of incessant litigation have overcome any desire to use common sense or reduce costs." (Emphasis added.)

{¶ 11} In short, we disagree with the claim that the trial court has deprived appellants of "all use of their real property." Accordingly, we hereby overrule appellants' first assignment of error.

II

{¶ 12} Appellants assert in their second assignment of error that the trial court impermissibly substituted its judgment for that of the Planning Commission, Board of Zoning Appeals and City Council. We disagree.

{¶ 13} The instant proceeding is not an administrative appeal for which the trial court could employ the abuse of discretion standard. Rather, this proceeding was a regular civil action in which the court was asked to decide if the actions of a municipality and its various subdivisions were lawful. Trial courts exercise de novo review on such legal issues and questions. See Pauley v. Carter, Montgomery App. Nos. 19109 & 19238, 2992-Ohio-4337, at ¶22. Thus, in the case sub judice the trial court did not err in handling this case as it would any other civil action.

{¶ 14} Furthermore, it is uncontroverted that the procedures that P&Z and City Council followed were flawed. We find no basis for holding that the trial court overstepped its authority, or applied an erroneous standard of review, in its determination of this case.

{¶ 15} Accordingly, based upon the foregoing reasons, we hereby overrule appellants' second assignment of error.[6]

III

[6] Appellants refer to the "Board of Zoning Appeals" in their brief, rather than P&Z. Because there is no evidence that a Board of Zoning Appeals reviewed their variance application, we assume appellants are referring to P&Z.

{¶ 16} Appellants assert in their third assignment of error that the trial court erroneously "shifted the burden of proof" in this case. Appellants' argument seems to be premised on some discussion in the court's decision about the "unnecessary hardship" that would be necessary to grant a "use variance" for the lot, and the court indicated that the appellants would have burden of proof for this issue.

{¶ 17} We agree with appellants' that the issues of "unnecessary hardship" or "use variances" are superfluous to the pivotal question in this case. In our view, however, appellants misinterpreted those comments as placing the burden of proof on them for the entire case. The issue here is whether the proper procedural mechanism was in place to grant that request for a variance. Among other things, the evidence revealed that both P&Z and City Council approved appellants' project. However, the City's zoning ordinance only makes provision for review by a "Board of Zoning Appeals."[7] In short, a commission (P&Z) for which there is no ordinance appears to have approved the project. The project was not approved by the only entity for which there is provision in the ordinance.[8]

{¶ 18} Judgments supported by competent and credible evidence will not be reversed on appeal. Vogel v. Wells (1991), 57 Ohio St.3d 91, 96, 566 N.E.2d 154; C.E. Morris Co. v. Foley Construction Co. (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, at the

[7] Pertinent portions of the Greenfield zoning ordinance were introduced into evidence below.

[8] The evidence suggests that the notice of hearing on the zoning variance may have been fatally flawed and that City Council failed to pass the proper sort of ordinance to allow the project to continue. However, given that the evidence showing the variance request was not reviewed by the proper entities, we need not and do not address those issues.

syllabus. This standard of review is highly deferential and even "some" evidence is sufficient to sustain the judgment and to prevent a reversal. See Barkley v. Barkley (1997), 119 Ohio App.3d 155, 159, 694 N.E.2d 989; Willman v. Cole, Adams App. No. 01CA725, 2002-Ohio-3596, ¶24.

{¶ 19} In the case sub judice, we conclude that sufficient evidence established that the variance was flawed because the proper procedures had not been followed. Thus, we find no error in the trial court's issuance of a permanent injunction.

{¶ 20} Accordingly, based upon the foregoing reasons, we hereby overrule the third assignment of error.

IV

{¶ 21} In their final assignment of error, appellants assert that the trial court erred "in finding that the City Law Director had a conflict of interest" and in not dismissing the lawsuit because of that conflict of interest. We disagree with appellants.

{¶ 22} Appellants cite no authority that mandates such action and we found none in our research. Although appellants cite various disciplinary rules, other avenues exist to pursue a violation of those provisions rather than the dismissal of a case. We also point out that whatever conflict arises from the Law Director owning a lot adjacent to the one at issue, that alleged conflict does not render the variance granted to appellants any less procedurally deficient. In other words, the outcome of this case would have been the same even if the Law Director did not own the contiguous property.[9]

[9] Indeed, the record indicates the City Law Director challenged variances granted to other applicants in the City and there is no evidence to indicate that he owned property adjacent to those lots.

{¶ 23} Accordingly, we hereby overrule the fourth assignment of error. Therefore, having reviewed all errors assigned and argued in the briefs, and finding merit in none of them, we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellants costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Highland County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY:

Peter B. Abele
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.