[Cite as *Bencin v. Bd. of Bldg. & Zoning Appeals*, 2009-Ohio-5570.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92991

EDWARD BENCIN, ET AL.

PLAINTIFFS-APPELLANTS

vs.

BOARD OF BUILDING & ZONING APPEALS

DEFENDANT-APPELLEE

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-673293

BEFORE: Blackmon, J., McMonagle, P.J., and Boyle, J.

RELEASED: October 22, 2009

JOURNALIZED:

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PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellants Edward Bencin ("Bencin") and Michael Gottlieb ("Gottlieb") appeal the trial court's refusal to permit a de novo hearing regarding their argument that provisions in the Highland Heights' zoning code were unconstitutional as applied to their property. Bencin and Gottlieb assigned a single error for our review.[1]

{¶ 2} Having reviewed the record and relevant law, we reverse the trial court's decision and remand for proceedings consistent with this opinion. The apposite facts follow.

Facts

{¶ 3} Bencin and Gottlieb owned two contiguous parcels of land in the city of Highland Heights. The land was situated between Miner Road and Lynden Drive. Bencin and Gottlieb wanted to subdivide the two parcels into six sublots, identical in size and shape to hundreds of surrounding lots.

{¶ 4} Bencin and Gottlieb submitted to the Planning Commission a proposed lot split and consolidation of the property into six 100 foot by 175 foot sublots. The Planning Commission advised them that variances were required for the sublots. The sublots were of the same dimensions as the surrounding lots, but, the zoning code had changed from when the surrounding lots were subdivided; consequently, they needed variances to

[1]See appendix.

make any changes. A request for the variances was filed, and a hearing was conducted.

{¶ 5} At the hearing, the City's Assistant Building Commissioner advised the Planning Commission that the new sublots would be served by existing storm and sanitary sewers and that the existing infrastructure could handle any additional water run-off. In addition, the City's Law Director noted that precedent had been set allowing proposed lot splits that matched the lot size of the surrounding properties. At the conclusion of the hearing, the Planning Commission unanimously approved the variances.

{¶ 6} A group of residents, who own property near the land, appealed the Planning Commission's decision to the Board of Zoning Appeals ("BZA"). At the end of the hearing, the BZA voted to reverse the Planning Commission's decision, noting that the variances did not meet the standards set forth in the City's Codified Ordinance §1113.10 and exceeded the ten-percent maximum variance allowed by §1113.13.

{¶ 7} Bencin and Gottlieb filed an appeal from the BZA decision to the Court of Common Pleas pursuant to R.C. 2506, arguing the BZA's decision was unreasonable and not supported by the preponderance of substantial, reliable, and probative evidence. They also argued that provisions in the City's code were unconstitutional as applied to their property. Specifically, they argued that the application of the City's zoning regulations to their

property deprived them of equal protection of the law, in violation of Section 2, Article I of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution. They also argued that as applied to their property, the City's zoning regulations bore no substantial relation to the public health, safety, morals, or general welfare of the community.

{¶ 8} In conjunction with their appeal, they also filed a motion for a de novo hearing on their constitutional challenges to the City's code. The trial court denied the de novo motion and entered judgment affirming the BZA's decision.[2]

Constitutional Challenge to Zoning Code

{¶ 9} In their sole assigned error, Bencin and Gottlieb contend the trial court erred by denying their request for a de novo hearing on their constitutional claims. We agree.

{¶ 10} It is well established that an administrative agency, such as a board of zoning appeals, cannot determine whether an ordinance is unconstitutional as applied to a particular parcel.[3] This type of

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[2]Subsequently, Bencin and Gottlieb also filed a motion for reconsideration and motion for relief from judgment, which were denied by the trial court and are not the subject of this appeal.

[3]*Roy v. Cleveland Bd. of Zoning Appeals* (2001), 145 Ohio App.3d 432; *SMC, Inc. v. Laudi* (1975), 44 Ohio App.2d 325; *Mobil Oil Corp. v. Rocky River* (1974), 38 Ohio St.2d 23; *FRC of Kamms Corner, Inc. v. Cleveland Bd. of Zoning Appeals* (1984), 14 Ohio App.3d 372; *Scafaria v. Fairview Park* (Nov. 12, 1992), Cuyahoga App. No. 61008; *Marquette Steel Co. v. Cleveland Bd. of Zoning Appeals* (Jan. 3, 1985), Cuyahoga App. No. 48397.

constitutional claim must be tried originally in the court of common pleas, with the court permitting the parties to offer additional evidence.[4] In fact, this court and other courts have reversed judgments in the past where the common pleas court denied the parties the opportunity to present evidence in a de novo hearing as to constitutional challenges to zoning codes as applied to the subject property.[5]

{¶ 11} We note the BZA and the City of Highland Heights contend that the trial court is not permitted to review evidence that was not before the board. However, the board does not have jurisdiction over whether the application of the zoning code is unconstitutional; thus evidence on this issue would not be presented to the board, which is why a de novo hearing is necessary.[6]

{¶ 12} The BZA and the City also argue that this court's decision in *Ziss Brothers Constr. Co., Inc. v. Indep. Planning Comm.*[7] supports their contention that a hearing is not necessary when additional evidence would

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[4]*FRC of Kamms Corner, Inc.*; *Roy*; *SMC, Inc.*

[5] *Roy*; *Snee v. Jackson Township Bd of Zoning Appeals*, 5th Dist. No. 2003CA00109, 2003-Ohio-5319; *Recreational Facilities, Inc. v. Hambden Twp. Bd. of Trustees* (June 30, 1995), 11th Dist. No. 93-G-1819; *Rife v. Franklin Cty. Bd. of Zoning Appeals* (1994), 97 Ohio App.3d 73; *SMC Inc.*; *Felder v. City Planning Comm. of Village of Pepper Pike* (Apr. 26, 1979), Cuyahoga App. No. 38663.

[6]*Pacific Financial Services of Am. Inc. v. Bd. of Zoning Appeals of Deerfield Twp.* (Nov. 17, 1989), 11th Dist. No. 1997; *Recreational Facilities, Inc.*

[7]Cuyahoga App. No. 90993, 2008-Ohio-6850.

not change the outcome. However, *Ziss* is distinguishable from the instant case because it did not involve a constitutional challenge to the code as applied to the subject property, instead it concerned the constitutionality of the procedures applied in the administrative appeal. In fact, we acknowledged in *Ziss*, that a de novo hearing is required when the challenge to the code is based on its constitutionality as applied to the subject property.[8]

{¶ 13} In the instant case, Bencin and Gottlieb, in their R.C. 2506 appeal, challenged the constitutionality of the code as applied to their specific property. Based on the aforementioned authorities, they should have been given an opportunity to present their constitutional claim at a de novo hearing.[9] Therefore, the assigned error is well taken insofar as it asserts that the trial court erred in failing to permit a de novo hearing based on Bencin's and Gottlieb's claim that the code is unconstitutional as applied to the subject property.

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[8]Id. at ¶42, 43.

[9]Appellant, appellee, and relevant case law all use the term "de novo" when referencing the hearing requested by appellant. Black's Law Dictionary, Sixth Edition, defines a hearing de novo as "a new hearing or a hearing for the second time, contemplating an entire trial in the same manner in which matter was originally heard and a review of a previous hearing. * * * On hearing 'de novo' court hears matter as court of original and not appellate jurisdiction. (Citation Omitted)." Although the court in the instant case is the court of original jurisdiction, the hearing requested is the original hearing as there was no prior hearing. Thus, we conclude, and appellate counsel agrees, the more appropriate term to apply to the hearing, would be "original hearing."

{¶ 14} The judgment of the trial court is reversed, and the matter is remanded for further proceedings in accordance with this opinion.

It is ordered that appellants recover from appellee their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

PATRICIA ANN BLACKMON, JUDGE

CHRISTINE T. McMONAGLE, P.J., and
MARY J. BOYLE, J., CONCUR

APPENDIX

Assignment of Error

"In appellants' R.C. Ch. 2506 administrative appeal of a decision of the City of Highland Heights Board of Building and Zoning Appeals denying variances which would allow Appellants to consolidate two contiguous parcels of land and subdivide them into six sublots identical in size and shape to hundreds of neighboring and nearby sublots, the common pleas court erred by denying Appellants the right to present evidence in a de novo hearing as to their challenges to the constitutionality of the City's zoning regulations as applied to the property to be subdivided."