[Cite as *Compass Homes, Inc. v. Upper Arlington Bd. of Zoning*, 2023-Ohio-2744.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Compass Homes, Inc.,	:	
Appellant-Appellant,	:	No. 22AP-663 (C.P.C. No. 21CV-7721)
v.	:	(REGULAR CALENDAR)
City of Upper Arlington Board of Zoning and Planning et al.,	:	
Appellees-Appellees.	:	

D E C I S I O N

Rendered on August 8, 2023

On brief: *Vorys, Sater, Seymour and Pease*, *LLP Joseph R. Miller*, *Kara M. Mundy*, and *Elizabeth S. Alexander*, for appellant. **Argued:** *Joseph R. Miller*.

On brief: *Kegler*, *Brown*, *Hill & Ritter Co., LPA*, *Catherine A. Cunningham*, and *Erica L. Kaple*, for appellee Frank Ciotola. **Argued:** *Catherine A. Cunningham*.

On brief: *Dave Yost*, Attorney General, *Darren Shulman*, *and Darlene Pettit*, for appellees City of Upper Arlington Board of Zoning and Planning, and the City of Upper Arlington. **Argued:** *Darren M. Shulman*.

APPEAL from the Franklin County Court of Common Pleas

BEATTY BLUNT, P.J.

{¶ 1} Appellant-appellant, Compass Homes, Inc. ("Compass"), appeals from the October 11, 2022 decision and final judgment of the Franklin County Court of Common Pleas affirming the November 21, 2021 decision of the City of Upper Arlington Board of Zoning and Planning (the "Board"), denying the application of Compass to split one parcel into two lots. (Oct. 11, 2022 Decision & Final Jgmt.) For the reasons that follow, we reverse the judgment of the trial court.

I. Facts and Procedural History

{¶ 2} Compass owns the parcel located at 2730 Fairfax Drive, which is on the corner of Fairfax and Edgehill Drives in Upper Arlington, Ohio, 43220 (the "Property"). The Property consists of Lot 16 and 10 feet of Lot 17 in the Fairfax Subdivision and is zoned R1-B, One-Family Residence District. Compass sought a lot split to construct two new single-family homes.

{¶ 3} On June 2, 2021, prior to Compass formally applying for the lot split, the Board informally reviewed the contemplated lot split during a work session at Compass' request. The sole issue before the Board at the work session was whether the lot split could be administratively approved by the City of Upper Arlington's Director of Community Development (the "Director"), subject to appeal to the Board, or whether Compass would be required to seek a variance to split the lot, requiring the Board to decide whether to grant a variance. The Board determined that an application to split the Property could be referred to the Director.

{¶ 4} On July 21, 2021, Compass filed an application to split the Property into two lots, and on July 23, 2021, the Director approved the application, subject to three conditions: (1) lot split documents could not be recorded until the existing home was razed; (2) the existing home had to be razed by January 23, 2022; and (3) new home designs must meet Upper Arlington's Unified Development Ordinance ("UDO") Article 7.17.

{¶ 5} On August 2, 2021, appellee-appellee, Frank Ciotola, who owns the property at 2707 Lear Road, located directly across the street from the Property, submitted an appeal of the Director's decision with the Board. In his appeal, Ciotola asserted, in essence, that the proposed lots resulting from the lot split would be incompatible with the neighborhood.

{¶ 6} On November 17, 2021, the Board conducted a hearing on Compass' lot split application. At the hearing, the Board heard testimony and received evidence from City Staff, Ciotola, witnesses from Compass and the other parties, and members of the public. At the conclusion of the hearing, the Board voted three-to-two (with two members absent) to grant the appeal and reverse the determination of the Director administratively approving the lot split.

{¶ 7} Subsequently, Compass filed an administrative appeal with the Franklin County Court of Common Pleas pursuant to R.C. 2506.04. On October 11, 2022, the trial

court issued its decision and final judgment affirming the November 21, 2021 decision of the Board denying the application of Compass to split one parcel (the Property) into two lots. In its decision, the trial court found that "[t]he November 21, 2021 Order by the Upper Arlington Board of Zoning and Planning is not unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record." (Oct. 11, 2022 Decision & Jgmt. Entry at 10.) Accordingly, the trial court affirmed the Board's decision. *Id.*

{¶ 8} This timely appeal followed.

II. Assignments of Error

{¶ 9} Appellant assigns the following three errors for our review:

> [1.] The trial court erred when it ignored Compass Homes' Compliance with applicable zoning regulations and relied instead on inapplicable zoning provisions to affirm denial of Compass Homes' lot split.
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> [2.] Even assuming application of § 7.17 to Compass Homes' lot split was correct, the court erred when it found that Compass Homes' application did not meet the requirements of § 7.17.
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> [3.] The trial court erred in rejecting Compass Homes' constitutional claim with respect to the application of § 7.17 to its proposed lot split.

III. Discussion

A. Standard of Review

{¶ 10} In an appeal brought pursuant to R.C. Chapter 2506, the trial court, acting as an appellate court, may find that the order or decision appealed from is "unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record." R.C. 2506.04. "Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from with instructions to enter an order, adjudication, or decision consistent with the findings or opinion of the court." *Id.* The grounds for reversal are set forth in R.C. 2506.04 as "a disjunctive list, so each ground must be read to have a distinct meaning." *Shelly Materials,*

Inc. v. Streetsboro Planning & Zoning Comm., 158 Ohio St.3d 476, 2019-Ohio-4499, ¶ 12, citing *Freedom Rd. Found. v. Ohio Dept. of Liquor Control*, 80 Ohio St.3d 202, 205 (1997). Thus, the presence of any one of the six grounds listed in R.C. 2506.04 will independently justify a trial court's reversal of an administrative order. *Id.*

{¶ 11} Although the scope of review for a trial court in an R.C. Chapter 2506 administrative appeal is not de novo, such an appeal " 'often in fact resembles a *de novo* proceeding.' " *Shelly Materials* at ¶ 13, citing *Kisil v. Sandusky*, 12 Ohio St.3d 30, 34 (1984), quoting *Cincinnati Bell, Inc. v. Glendale*, 42 Ohio St.2d 368, 370 (1975). The trial court " 'weighs the evidence to determine whether a preponderance of reliable, probative, and substantial evidence supports the administrative decision, and if it does, the court may not substitute its judgment for that of' the administrative agency." *Id.*, citing *Independence v. Office of the Cuyahoga Cty. Executive*, 142 Ohio St.3d 125, 2014-Ohio-4650, ¶ 13. The trial court is not permitted to " 'blatantly substitute its judgment for that of the agency, especially in areas of administrative expertise.' " *Id.*, citing *Dudukovich v. Lorain Metro. Hous. Auth.*, 58 Ohio St.2d 202, 207 (1979). Nevertheless, the trial court has " 'the power to examine the whole record, make factual and legal determinations, and reverse the [administrative agency's] decision if it is not supported by a preponderance of substantial, reliable, and probative evidence.' " *Id.*, citing *Cleveland Clinic Found. v. Cleveland Bd. of Zoning Appeals*, 141 Ohio St.3d 318, 2014-Ohio-4809, ¶ 24, citing *Dudukovich* at 207.

{¶ 12} A trial court's decision in an R.C. Chapter 2506 administrative appeal may be appealed to the court of appeals but only on "questions of law." *Shelly Materials* at ¶ 17, citing R.C. 2506.04. Thus, "under R.C. 2506.04, an appeal to the court of appeals is 'more limited in scope' than was the appeal to the trial court." *Id.*, citing *Kisil* at 34; *see id.* at 34, fn. 4. While the trial court "is required to examine the evidence, the court of appeals may not weigh the evidence." *Id.*, citing *Independence* at ¶ 14. In addition to deciding purely legal issues, which are reviewed de novo, the court of appeals is charged with determining whether the trial court abused its discretion, "which in this context means reviewing whether the lower court abused its discretion in deciding that an administrative order was or was not supported by reliable, probative, and substantial evidence." *Id.*, citing *Boice v. Ottawa Hills*, 137 Ohio St.3d 412, 2013-Ohio-4769, ¶ 7, citing *Kisil* at 34.

{¶ 13} Therefore, our determination in the within matter is limited to (1) whether the trial court made any errors of law assigned on appeal, which we review de novo, and (2) whether the trial court abused its discretion in applying the law. *Access Ohio, LLC v. City of Gahanna*, 10th Dist. No. 19AP-64, 2020-Ohio-2908, ¶ 13, citing *One Neighborhood Condominium Assn. v. Columbus, Dept. of Pub. Util., Div. of Water*, 10th Dist. No. 16AP-653, 2017-Ohio-4195, ¶ 14.

B. Appellant's Third Assignment of Error

{¶ 14} We begin our discussion with appellant's third assignment of error because we find it dispositive of this matter. In its third assignment of error, appellant asserts that the trial court erred in rejecting its constitutional claim with respect to the application of § 7.17 to its proposed lot split. We agree.

{¶ 15} "The void-for-vagueness doctrine is a component of the right to due process and is rooted in concerns that laws provide fair notice and prevent arbitrary enforcement." *In re Columbus S. Power Co.*, 134 Ohio St.3d 392, 2012-Ohio-5690, ¶ 20, citing *Skilling v. United States*, 561 U.S. 358 (2010). " 'It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.' " *In re Judicial Campaign Compl. Against Stormer*, 137 Ohio St.3d 449, 2013-Ohio-4584, ¶ 18, quoting *Grayned v. Rockford*, 408 U.S. 104, 108 (1972). "[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." *Grayned* at 108; *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 44 (1991).

{¶ 16} It is true that "[t]he void-for-vagueness doctrine does not require statutes to be drafted with scientific precision." *Maga v. Ohio State Med. Bd.*, 10th Dist. No. 11AP-862, 2012-Ohio-1764, ¶ 29. Further, "a civil statute that is not concerned with the first amendment is only unconstitutionally vague if it is so vague and indefinite as really to be no rule or standard at all or if it is substantially incomprehensible." *Id.* Nevertheless, a statute will be deemed impermissibly vague if it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," or "authorizes or even encourages arbitrary and discriminatory enforcement." *161 Dublin, Inc. v. Ohio State Liquor Control Comm.*, 10th Dist. No. 01AP-134, 2001 Ohio App. LEXIS 5905, *33 (Dec. 27, 2001), citing *Hill v. Colorado*, 530 U.S. 703, 732 (2000); *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, ¶ 84. Put another way, " '[a] law is void for

vagueness if persons of common intelligence must necessarily guess at its meaning.' " *Id.*, quoting *State v. Johnson*, 139 Ohio App.3d 952, 956 (2d Dist.2000), following *Coates v. Cincinnati*, 402 U.S. 611 (1971). Thus, a zoning ordinance that fails to "afford a reasonable individual of ordinary intelligence fair notice and sufficient definition and guidance to enable him to conform his conduct to the law" will be deemed void for its vagueness. *Pataskala Banking Co. v. Etna Twp. Bd. of Zoning Appeals*, 5th Dist. No. 08 CA 128, 2009-Ohio-3108, ¶ 37.

{¶ 17} Article 7, Section 7.17 of the UDO is titled "Residential Design Standards" and provides as follows:

> (A) Purpose and intent: The purpose of these standards is to encourage residential investment and infill redevelopment to maintain and expand the property values in Upper Arlington, while also protecting the character of the residential neighborhoods by ensuring that new development blends in and is compatible with existing and prominent neighborhood characteristics. These standards are in addition to all other standards and requirements of the Unified Development Ordinance.
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> (B) Applicability: The following standards apply to the design of new single-family homes, major additions that exceed fifty percent (50%) of the total existing square footage, second story additions, additions over 1,000 square feet, detached garages over four hundred (400) square feet in area, any proposed modification of a Contributing Structure whereby its historical significance is materially compromised, and newly created or modified parcels.
>
> (1) Neighborhood compatibility: **The *proposed design* shall be *consistent and compatible with* prominent characteristics existing in the neighborhood**, with particular consideration and focus on the characteristics existing on the same block (both sides of the street within two intersecting streets) or cul-de-sac as the subject property. Such characteristics include: parcel or homesite width and configuration, architectural style and materials, heights and massing, front yard setbacks, roof pitch and shape, garage location, amount of impervious surface, and other defining features of the neighborhood and with an emphasis on the block. Review for compatibility shall be based on all characteristics.

(Emphases added.) Our reading and analysis of the foregoing zoning ordinance leads us to the conclusion that, as applied to appellant's proposed lot split, § 7.17 (B)(1) is unconstitutionally vague for the reasons explained below.

{¶ 18} First, as set forth above, § 7.17(B)(1) states that the "proposed design shall be consistent and compatible with prominent characteristics existing in the neighborhood * * *[.]" Yet, the concept of a "design" is incongruous with the subdivision of land in the first instance. Furthermore, even if a "design" were congruous with the subdivision of land, the term is undefined by § 7.17(B), and we find it is wholly ambiguous in the context of a lot split because § 7.17(B) does not provide a "reasonable individual of ordinary intelligence" any method by which to determine whether the "proposed design" of a specific lot is "consistent and compatible with prominent characteristics existing in the neighborhood."

{¶ 19} Likewise, the terms "consistent" and "compatible" are both undefined by § 7.17(B) and ambiguous, particularly when applied to a residential neighborhood with lots that are as diverse in size and shape as the neighborhood implicated in the instant matter. Indeed, the record shows that Board's Chairman himself mused aloud during the June 2, 2021 work session: "What is compatibility in a neighborhood that is this diverse?" (June 2, 2021 Video Recording at 1:55.) Even more telling, the record also shows that existing lots in the neighborhood range from 11,809 to 40,676 square feet and include frontages ranging from 81 feet to 202 feet. The lots resulting from appellant's proposed lot split fall within these ranges: the proposed northern lot would be 12,735 square feet with a frontage of 90 feet and the proposed southern lot would be 17,822 square feet with a frontage of 123 feet. The proposed southern lot, a corner lot, would also have a secondary frontage of 149 feet which also falls within the range of secondary frontages for corner lots. Quite simply, if the resulting proposed lots are not considered "compatible and consistent with" the neighborhood characteristics concerning the size of the lots, it is surely impossible to determine from § 7.17(B) what size and/or configuration of any proposed lots *would be* considered compatible and consistent with the neighborhood.

{¶ 20} As set forth above, " '[a] law is void for vagueness if persons of common intelligence must necessarily guess at its meaning.' " *161 Dublin, Inc.* at 732. In this instance, a person of common intelligence would necessarily be required to guess what is meant by "consistent" and "compatible" with the neighborhood when contemplating a

proposed lot split. Thus, as applied to appellant's proposed lot split, § 7.17(B) does not provide fair notice of what a proposed lot must look like to be deemed "consistent" and "compatible" with the neighborhood characteristics so as to comport with basic notions of due process. Therefore, as applied to appellant's application for its proposed lot split, we find that § 7.17 is void-for-vagueness. Accordingly, appellant's third assignment of error is sustained.

C. Appellant's First and Second Assignments of Error

{¶ 21} We have already found that the trial court erred in rejecting appellant's constitutional claim with respect to the application of § 7.17 to appellant's proposed lot split and that, as applied to appellant, § 7.17 is void-for-vagueness. Accordingly, appellant's first and second assignments of error are rendered moot.

IV. Disposition

{¶ 22} For the foregoing reasons, we sustain appellant's third assignment of error, find moot appellant's first and second assignments of error, and reverse the judgment of the Franklin County Court of Common Pleas affirming the November 21, 2021 decision of the City of Upper Arlington Board of Zoning and Planning.

Judgment reversed and vacated.

DORRIAN and MENTEL, JJ., concur.