

STATE OF MICHIGAN
COURT OF APPEALS

ROY SMITH CO. and ROY SMITH
INVESTMENT CO.,

UNPUBLISHED
July 2, 1999

Plaintiffs-Appellants,

v

AARO WASTE PAPER CO. and CITY OF
DETROIT,

No. 205640
Wayne Circuit Court
LC No. 96-691359 AA

Defendants-Appellees.

Before: Bandstra, C.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

Plaintiffs, Roy Smith Co. and Roy Smith Investment Co. (collectively, “Smith”), appeal by leave granted a circuit court order affirming the decision of the Detroit Board of Zoning Appeals (the “BZA”). We reverse the circuit court order and remand to the BZA for further proceedings.

I. Basic Facts And Procedural History

This case involves proposed construction by Aaro Waste Paper Company (“Aaro”) of a waste transfer and recycling facility on its property at 14333 Goddard Street in Detroit. Aaro’s property is zoned M-4, “intensive industrial district.” Such a use is permitted as of right in an M-5 district, Detroit Zoning Ordinance § 105.0302, and therefore may be permitted with approval in the M-4 district. In accordance with the procedure set forth in Detroit Zoning Ordinance § 65.0000, Aaro filed an application with the Detroit Building and Safety Engineering Department (the “B&SE”), which denied Aaro’s request to construct its proposed facility. Aaro appealed the decision to the BZA, which reversed the decision of the B&SE. Smith, a property owner in the area of the proposed facility, appealed this decision to the circuit court, pursuant to MCL 125.585(11); MSA 5.2935(11), which affirmed the decision. Smith filed an application for leave to appeal with this Court, which was granted. This Court reversed the decisions of the circuit court and the BZA, holding that the BZA did not make the findings required by Detroit Zoning Ordinance § 65.0400. This Court remanded the case to the BZA for further proceedings. On remand, the BZA agreed with its prior decision and again issued a decision allowing Aaro to construct its proposed facility. Smith again appealed this decision to the

circuit court pursuant to MCL 125.585(11); MSA 5.2935(11). The circuit court once more affirmed the decision of the BZA. Smith filed a second application for leave to appeal, which this Court granted.

II. Standard Of Review

This Court reviews appeals from decisions by city zoning boards to circuit courts de novo; however, we accord great weight to the findings of the circuit court. *Rogers v Allen Park*, 186 Mich App 33, 36; 463 NW2d 431 (1990). This Court will grant appellate relief only if it is convinced that it would have reached a different result sitting as the circuit court. *Rogers, supra* at 37.

III. Satisfaction Of The Zoning Ordinance Requirements

A. Introduction

On appeal, plaintiff argues that the BZA's decision was not supported by competent, material and substantial evidence, and therefore, that the circuit court erred in affirming the BZA's decision. This Court has previously explained the application of the City of Detroit's zoning ordinances to the present case:

This case involves the proposal of the [defendant Aaro] to construct and operate a solid waste transfer and recycling facility on its property at 14333 Goddard Street in Detroit. The property is zoned M-4, "intensive [] industrial district." Pursuant to Detroit Zoning Ordinance, § 104.0100, many "usually objectionable" uses, including sewage disposal plants, are permitted as a matter of right in an M-4 district. The use desired by Aaro is permitted as of right in an M-5 district, § 105.0302, and therefore, may be permitted with approval in the M-4 district. § 104.0300. Section 65.0000 *et seq.* of the zoning ordinance governs "permitted with approval uses." [*Roy Smith Co v Detroit*, unpublished opinion per curiam of the Court of Appeals, Docket No. 176318, p 1.]

The findings made by a zoning board are inadequate if they merely repeat the language of an ordinance. *Badanek v Schroskey*, 21 Mich App 582, 584-585; 175 NW2d 784 (1970). Furthermore, as we said in our earlier decision, judicial review of a zoning board's decision should not require this Court to infer the board's findings from its ultimate decision. *Smith, supra* at 4.

B. The Requirements Of The Ordinance

Detroit Zoning Ordinance § 65.0400 sets forth the applicable standards, all of which must be satisfied, for determining whether a "permitted with approval use" should be approved. The ordinance states:

(A) No permitted with approval use shall be approved by the buildings and safety engineering department or the board of zoning appeals on appeal unless all of the following findings are made.

(B) That the establishment, maintenance, location and operation of the proposed permitted with approval use will not be detrimental to or endanger the social, physical or economic well being of the surrounding neighborhoods, nor aggravate any pre-existing physical, social or economic deterioration of surrounding neighborhoods[; and]

(C) That the permitted with approval use will not be injurious to the use and enjoyment of other property in the immediate vicinity for the purposes permitted, nor substantially diminish or impair property values within the neighborhood; and

(D) That the establishment of the permitted with approval use will not impede the normal and orderly development and improvement of surrounding property for use permitted in that district; and

(E) That adequate utilities, access roads, drainage, and other necessary facilities have been or will be provided; and

(F) That adequate measures have been or will be taken to provide ingress and egress designed so as to minimize traffic congestion in the public streets; and

(G) That the permitted with approval use will in other respects conform to the applicable regulations of the district in which it is located.

C. The BZA's Findings On Remand

Addressing the requirements of the ordinance on remand, the BZA made the following findings:

(1) The Board found that the establishment, maintenance, location and operation of the proposed Rubbish Transfer Station will not be detrimental to, or endanger the social, physical or economic well being of the surrounding neighborhoods, nor aggravate any preexisting physical, social or economic deterioration of surrounding neighborhoods in part because the premises are located in an intensive industrial district (M4) and per the Zoning Ordinance a [sic] (M4) district will permit uses which are usually objectionable. Therefore, to allow a Rubbish Transfer Station at this location would be in keeping with the intent and purpose of a [sic] (M4) district in question.

(2) The Board further found that the Rubbish Transfer Facility will not be detrimental to the social, physical or economic well being of the surrounding neighborhood because all operations will be conducted within a building; furthermore, the proposed use is consistent with the adjacent legal use of the block in question, a Rubbish Transfer Station.

(3) The Board further found that although residential development exists within the immediate area, the dwellings are nonconforming in a [sic] (M4) zone (Intensive Industrial District), and therefore, subject to the objectionable uses and characteristics of the existing uses permitted in the zone. Furthermore, a buffer exists between the

existing residential property and the site in the forms of a railway line and industrial development. Therefore, to permit the proposed use would not change or alter physical and social characteristics of the area.

(4) The Board further found that the current use of the property as a trucking terminal in a [sic] (M4) zone is an allowed use, and therefore, truck traffic and the loading unloading [sic] of trucks is already occurring on the site, and is somewhat similar to truck activity that will occur with the proposed use, and therefore, is not introducing a new activity in the (M4) zone.

(5) The Board further found that the Rubbish Transfer Station will not impede the normal and orderly development, and improvement of the existing and permitted uses in the surrounding area because the site will be screened from view by eight foot walls and landscaping which must be approved by the City Planning Commission, and the Planning and Development Department, so as to assure that the facility will not be detrimental to the surrounding land uses.

(6) The Board further found that adequate utilities, access roads, drainage, and other necessary facilities are provided at the proposed location because the premises are located in an established (M4) district that provides the necessary industrial requirements relating to utilities, drainage, and other necessary facilities for objectionable uses.

(7) The Board further found that the Rubbish Transfer Station will not create or aggravate traffic congestion on the public streets because adequate ingress and egress to the site will be provided, all staging of trucks must be within the boundaries of the property, and all access routes to the site, and the design and location of all ingress and egress to the property must be approved by the Department of Transportation to ensure that adequate measures will be taken to minimize traffic congestion.

(8) The Board further found that allowing the Rubbish Transfer Station at the location will not be detrimental to the property values of the existing industrial use in the area because of conditions formulated by three City Departments. Specifically, conditions established by the Board of Zoning Appeals, Buildings and Safety Engineering Department, and the City Planning Commission have been placed on the proposed use in order to ensure the use will be operated in a manner that will not be detrimental to or endanger the social, physical or economic well being of the surrounding neighborhoods, nor aggravate preexisting physical, social or economic deterioration of the surrounding area.

(9) The Board further found that a Rubbish Transfer Station will not endanger the safety, health or general well being of residents and employees in the immediate area because the operation will be monitored by State, County, and City Agencies licensing such facilities.

D. Injury To The Use And Enjoyment Of Surrounding Property

Smith argues that the only evidence presented to the BZA demonstrated that Aaro's proposed use would be injurious to the use and enjoyment of surrounding property. Specifically, Smith argues that the evidence established that property values would decrease, thereby violating § 65.0400(C). As noted above, the BZA made the following findings regarding property values:

The Board further found that allowing the Rubbish Transfer Station at the location will not be detrimental to the property values of the existing industrial use in the area because of conditions formulated by three City Departments. Specifically, conditions established by the Board of Zoning Appeals, Buildings and Safety Engineering Department, and the City Planning Commission have been placed on the proposed use in order to ensure the use will be operated in a manner that will not be detrimental to or endanger the social, physical or economic well being of the surrounding neighborhoods, nor aggravate preexisting physical, social or economic deterioration of the surrounding area.

The BZA found that property values would not suffer because of conditions placed upon Aaro's proposed use. This finding is contrary to the evidence before the BZA. The B&SE stated that Aaro's proposed waste facility would "endanger the . . . economic well being of surrounding properties." Further, Ronald Nelson of the Dean Appraisal Company, concluded that Aaro's proposed use "would have an adverse affect on property values in the area, including the [plaintiff's] property." On the other hand, we are unable to find *any* evidence to refute Smith's evidence that property values would decline. Neither of defendants' briefs on appeal cite any evidence which would support a conclusion that property values would not decline.

Apparently, the BZA's decision was based upon the belief that the conditions placed upon Aaro would prevent property values from declining. When the case was remanded to the BZA, this Court stated that "unless the evidence shows that the facility will not substantially diminish or impair property values, and the BZA makes that finding, the BZA is precluded from approving the use." *Smith, supra* at 3. Here, the evidence does not show that property values will remain the same or increase. On the contrary, the evidence presented to the BZA showed that property values would decline. Because the evidence shows that property values will decline, we conclude that Detroit Zoning Ordinance § 65.0400(C) has not been satisfied, and therefore, Aaro's proposed use was erroneously granted by the BZA.¹

E. Excessive Noise, Dust, And Odors; Fire Hazard

Smith argues that the evidence failed to establish that Aaro's proposed use would not produce excessive noise, dust, and odors. Smith also contends that Aaro's proposed facility is a fire hazard and that it could expose neighboring properties to hazardous substances. In support of these contentions, Smith submitted a report from Robert Tobin, a member of an architectural and engineering firm. Tobin's report pointed out several potential problems that could be caused by Aaro's proposed facility, such as rodents, smell, noise, debris, dust, and a fire hazard. Neither Aaro nor the City of Detroit

points to any evidence in their briefs which demonstrates that the proposed facility will not be injurious to the use or enjoyment of property in the immediate vicinity.

Again, Detroit Zoning Ordinance § 65.0400(C) requires that a permitted use not be “injurious to the use and enjoyment of other property in the immediate vicinity.” In its initial decision, the BZA stated:

(3) The Board further found that the proposed facility would not be detrimental to, nor would the activities impede the use and enjoyment of the properties in the immediate area because the operation is required to meet all applicable health, safety, air pollution and traffic flow regulations to obtain the required permits and licenses to operate the facility.

However, when the BZA issued its second set of findings in this matter, it did not address the effect that Aaro’s proposed facility would have on the use and enjoyment of other property in the surrounding area. Therefore, the requirements of Detroit Zoning Ordinance § 65.0400(C) were not satisfied because the evidence failed to establish that Aaro’s proposed facility would not be injurious to the use and enjoyment of surrounding property. When the BZA initially addressed this requirement, it stated that Aaro’s proposed facility would not affect the use and enjoyment of the surrounding property because the facility was subject to health and safety regulations. This finding is similar to the BZA’s findings as to property values, which we have found to be unacceptable. The BZA did not base this finding on evidence; instead, it was based upon the hope that Aaro’s proposed facility would comply with health and safety regulations. The BZA had an opportunity to address these shortcomings when this Court remanded the case to it. However, the BZA did not choose to address whether Aaro’s proposed facility would be injurious to the use and enjoyment of the surrounding property. Therefore, as the BZA did not make findings as to whether Aaro’s proposed facility would be injurious to the use and enjoyment of nearby properties, we conclude that Detroit Zoning Ordinance § 65.0400(C) has not been satisfied.

F. Adequate Ingress And Egress

Smith also claims that Detroit Zoning Ordinance § 65.0400(F), which requires that adequate measures be taken to provide ingress and egress so as to minimize traffic congestion, has not been satisfied. We disagree. When it initially addressed this requirement, the BZA found:

(2) The Board further found that the proposed recycling/transfer facility would not interfere with vehicular and pedestrian traffic because the site is of adequate size to contain all staging, tipping, loading, storage and parking requirements of the use.

The BZA reiterated its findings after this Court remanded the case, stating that Aaro’s proposed facility would not cause traffic problems because “all staging of trucks must be done within the boundaries of the property.” We conclude that this finding is sufficient to satisfy Detroit Zoning Ordinance § 65.0400(F). The BZA specifically found that Aaro’s proposed facility was large enough to handle all

necessary activities associated with Aaro's proposed facility and that traffic would not be affected. Therefore, we hold that this finding was sufficient.

G. Aaro's Track Record

Smith argues that Aaro's proposed facility should have been denied by the BZA based upon Aaro's poor track record at a similar facility. Although such information may be interesting, it is not relevant to a determination under Detroit Zoning Ordinance § 65.0400. We conclude that none of the criteria set forth in the ordinance concern themselves with the past performance of an applicant for a "permitted with approval use." Therefore, we hold that, since such information was not relevant to a determination under Detroit Zoning Ordinance § 65.0400, the BZA was not required to address the matter.

H. Conclusion

We find that the circuit court erred in determining that the BZA's decision complied with Detroit Zoning Ordinance § 65.0400. Accordingly, we vacate the circuit court's order affirming the BZA's decision and remand the case to the BZA. On remand, the BZA shall hold a public hearing, with notice as required by the Detroit Zoning Ordinance and state law², in order to make an adequate evidentiary record. The BZA shall base its findings on that record and shall clearly indicate the record evidence that supports each of its findings. In light of this disposition of the case, Smith's remaining issue need not be addressed.

Reversed and remanded to the BZA. We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ William C. Whitbeck

/s/ Michael J. Talbot

¹ Indeed, we observe that the BZA's finding that property values will not decline was more in the nature of a hope or expectation rather than a finding of fact based on evidence.

² See MCL 125.585(8); MSA 5.2935(8).