

STATE OF MICHIGAN
COURT OF APPEALS

CITY OF DETROIT DOWNTOWN
DEVELOPMENT AUTHORITY,

UNPUBLISHED
May 22, 2008

Petitioner-Appellee,

v

No. 262311
Wayne Circuit Court
LC No. 04-439264-AV

US OUTDOOR ADVERTISING, INC.,

Respondent-Appellant,

ON REMAND

and

CITY OF DETROIT BOARD OF ZONING
APPEALS,

Respondent-Appellee.

Before: Hoekstra, P.J., and Meter and Donofrio, JJ.

PER CURIAM.

Respondent US Outdoor Advertising, Inc., appealed to this Court by leave granted from the circuit court's order reversing the decision of respondent City of Detroit Board of Zoning Appeals (BZA) to grant a variance to US Outdoor to install a prominent advertising sign on a building at 124 Cadillac Square in Detroit. This Court dismissed the appeal, finding that petitioner City of Detroit Downtown Development Authority (DDA) had no standing to challenge the BZA's decision in the circuit court.¹ See *Detroit Downtown Development Authority v US Outdoor Advertising, Inc.*, unpublished opinion per curiam of the Court of Appeals, issued April 12, 2007 (Docket No. 262311), rev'd 480 Mich 991 (2007). Subsequently, the Supreme Court reversed this Court's decision and remanded the case to us for consideration of US Outdoor's substantive issue on appeal. *Detroit Downtown Development Authority v US Outdoor Advertising, Inc.*, 480 Mich 991; 742 NW2d 133 (2007). This issue concerns whether

¹ Judge Meter dissented from majority opinion.

the circuit court erred in finding that the BZA's decision was contrary to law. We affirm the circuit court.

US Outdoor intended to lease advertising space and install "super graphic" advertisements on five buildings in downtown Detroit, including the building at 124 Cadillac Square, in the city's central business district. "Super graphic ads are colorful, dramatic, huge, artistic advertisements often created on a vinyl mesh application that adheres to the side of a building either by an adhesive or through the use of grommets." *Detroit Downtown Development Authority, supra*, slip op pp 1-2 n 2. The proposed Cadillac Square advertisement was not permitted under the Detroit Zoning Ordinance, which prohibited advertising signs within five hundred feet of a public park or an historic district, and also regulated the size of advertising signs.

US Outdoor applied for a land use variance. The DDA opposed US Outdoor's petition, arguing that the proposed sign would adversely impact the DDA's development activities in the area. The Detroit Buildings and Safety Engineering Department denied the variance request. US Outdoor appealed the decision to the BZA.

The Detroit Zoning Ordinance authorizes the BZA to grant variances in certain limited circumstances. A petitioner must show that the zoning ordinance results in "practical difficulty or unnecessary hardship that would deprive the owner of reasonable use of land or building involved." Detroit Zoning Ordinance, § 62.0403. Also, "[s]uch variance shall be granted only in cases of property having unique characteristics which prevent reasonable use of the property as zoned." *Id.*

The BZA held a hearing on US Outdoor's variance request. This Court's previous opinion summarized the testimony:

At the BZA hearing on the matter, US Outdoor spoke of its plans to lease space on the buildings in question, the building owners' support for its plans, the nature of the ads, and its placement of similar ads in other cities. US Outdoor extolled the virtue of the ads stating that the ads: enhance the surrounding area with artwork, draw people downtown, promote sales and service, and generate tax dollars. An agent of the DDA spoke in opposition to US Outdoor's plans asserting the ads were detrimental to the overall redevelopment of the Campus Martius area and could affect DDA's ability to draw tenants for its garage. [*Detroit Downtown Development Authority, supra*, slip op p 2 (footnotes omitted).]

Harry Monroe, owner of the Checker Bar in the building at issue in this appeal, testified that he would welcome the advertising income² because "business is not that great."

The BZA granted the variance. The Board's order set forth its findings and conclusions:

² The "super graphic" advertisement would be advertising a business other than the Checker Bar.

(1) Under the Use Variance Section 62.0403, the Board found that this would be an accessory use and not have any affect [sic] to the primary use, which is a building itself with a restaurant that's been therefore [sic] a number of years throughout the city's history and that will obviously maintain and continue to be of primary use.

(2) The Board also found that the plight of the owner in this instance was due to the unique circumstances. They look to this wall face as providing supplement [sic] income to their business, to the upkeep of their property.

(3) The Board further found that the character that [sic] would be altered, in a positive fashion, not in a negative fashion. Right now it's a blank two-story wall along side [sic] of the circus parking lot that's been there a number of years. It's a low scale wall sign.

(4) The Board further found that under the Dimensional Variance section, 62.0402(G)[,] that type of sign within those dimensions and within those limits would be appropriate.

(5) The Board further found that to Grant the Use Variance and waive the deficiencies as listed with certain conditions to protect the surrounding area would not be contrary to the spirit and purpose of the Zoning Ordinance.

The DDA appealed to the circuit court, arguing that the BZA's decision was not supported by competent, material, and substantial evidence on the whole record, and was an abuse of discretion. The court agreed and reversed the BZA's decision. The court concluded that the BZA did not make, and the evidence would not support, a finding of undue hardship on the property owner or an inability to make reasonable use of the property as zoned:

[T]he Board of Zoning Appeals overstepped its bounds given what its mandate was and given the fact that this is an oversized [sign] and all the rest of the situation and that . . . I decided a decision of abuse of discretion on the part of the BZA in granting that.

* * *

But one of the things I was struck by is the fact that you can't say — Like Checker says, well, you know, it helped me. Business is not that great. And if I could rent out this wall, man, I could raise some money to help me maintain the business, help the business and all the rest of it. But that's not enough.

In my reading the law says, hey, you can't come in here and say, listen, it would be economically better if I did it this way. They say that's not enough . . . All they're saying is that, listen, we don't sell as many hamburgers as we'd like to. It would be nice to get some money from the wall that supports the structure that we do our business in. . . . That's not an undue hardship.

. . . I did not find an undue hardship. I did not find that it was incapable of being used for one of the purposes allowed under the ordinance and so forth.

In reviewing a circuit court's decision in an appeal from an agency, this Court must determine whether the circuit court "applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the factual findings," a standard of review "indistinguishable from the clearly erroneous standard of review." *Boyd v Civil Service Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996).

Former MCL 125.585(11)³ provided for appeals to the circuit court from decisions of the BZA. The circuit court was required to affirm the BZA's decision unless it was "(1) contrary to law, (2) based on improper procedure, (3) not supported by competent, material, and substantial evidence on the record, or (4) an abuse of discretion." *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 339; 675 NW2d 271 (2003). "'Substantial evidence' is evidence that a reasonable person would accept as sufficient to support a conclusion." *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 72; 592 NW2d 724 (1998). A reviewing court must give due deference to the board's expertise and may not displace the board's choice between two reasonably differing views. *Davenport v Grosse Pointe Farms Bd of Zoning Appeals*, 210 Mich App 400, 405-406; 534 NW2d 143 (1995).

As noted, the Detroit Zoning Ordinance authorizes the BZA to grant a variance if a petitioner shows that the zoning ordinance results in "practical difficulty or unnecessary hardship that would deprive the owner of reasonable use of land or building involved." Detroit Zoning Ordinance, § 62.0403.⁴ A zoning board's finding of "unnecessary hardship" must be supported by substantial evidence that

(1) the property cannot reasonably be used in a manner consistent with existing zoning, (2) the landowner's plight is due to unique circumstances and not to general conditions in the neighborhood that may reflect the unreasonableness of the zoning, (3) a use authorized by the variance will not alter the essential character of a locality, and (4) the hardship is not the result of the applicant's own actions. [*Janssen v Holland Charter Twp Zoning Bd of Appeals*, 252 Mich App 197, 201; 651 NW2d 464 (2002).]

The Detroit Zoning Ordinance incorporates most of these standards:

A use variance shall not be granted unless the board finds, on the basis of substantial evidence, that the property cannot reasonably be used in a manner consistent with existing zoning, and before the board may exercise its discretion

³ The Legislature has repealed MCL 125.585, but it applies in this case, which was pending on the date of repeal. MCL 125.3702(2).

⁴ We reject US Outdoor's attempt to argue, in its reply brief, that the variance here was governed solely by Detroit Zoning Ordinance, § 62.0402 (dimensional variances), as opposed to Detroit Zoning Ordinance, § 62.0403 (use variances).

and grant a use variance on the grounds of unnecessary hardship, the record must demonstrate:

(a) That the property in question cannot be reasonably used only for a purpose permitted in that zone, and

(b) That the plight of the owner is due to unique circumstances and not to general conditions in the neighborhood, and

(c) That the use to be authorized by the variance will not alter the essential character of the locality. [Detroit Zoning Ordinance, § 62.0403.]

We hold that the circuit court did not err in ruling that US Outdoor failed to make the threshold showing under (a). Whether property can reasonably be used for a purpose consistent with existing zoning depends on whether a reasonable return can be derived from the property as zoned. *Janssen, supra*, 252 Mich App at 201-202. Mr. Monroe's comment that "business is not that great" and his desire for the advertising revenue fell far short of establishing that the building is not reasonably usable as currently zoned. The evidence did not establish that Monroe could not derive a reasonable economic return for his use of the property as zoned. To the contrary, it was undisputed that the Checker Bar had operated at that location for approximately 25 years, under the existing zoning scheme. There was no evidence to suggest that it could not continue to operate there into the foreseeable future, again under the existing zoning scheme. Accordingly, the BZA's decision was not supported by competent, material, and substantial evidence on the record. The circuit court identified a proper basis for reversing the BZA's decision, and the court's ruling was not clearly erroneous.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Patrick M. Meter
/s/ Pat M. Donofrio