

STATE OF MICHIGAN
COURT OF APPEALS

CITY OF GROSSE POINTE PARK,

Petitioner-Appellant,

UNPUBLISHED
April 19, 2012

v

DETROIT HISTORIC DISTRICT
COMMISSION,

No. 298802
Wayne Circuit Court
LC No. 09-023736-AA

Respondent-Appellee.

Before: FORT HOOD, P.J., and HOEKSTRA and METER, JJ.

PER CURIAM.

Petitioner, the city of Grosse Pointe Park (GPP), appeals by leave granted from an order denying appellate relief to GPP and affirming the decisions of respondent, Detroit Historic District Commission (the DHD commission), and the Michigan Department of History, Arts, and Libraries' State Historic Preservation Review Board (the review board), which had rejected GPP's petition to demolish vacant buildings that it owns in Detroit. We affirm.

I. FACTS

This case arises out of GPP's efforts to obtain approval to demolish buildings that it owns at 14901-14915 and 14917 East Jefferson in Detroit, immediately adjacent to the border with GPP. The building located at 14901-14915 East Jefferson was constructed in 1918 and shares a wall with the building located at 14917 East Jefferson, which was built in 1920. On or about April 24, 2007, GPP applied to the Detroit Building Safety and Engineering Department (the BS&E Department) for a permit to demolish and remove the two buildings. The BS&E Department promptly issued a permit to raze the buildings. GPP was involved in negotiations with the Detroit Department of Transportation to develop the properties in order to relocate a bus turnaround loop on the site from its present location approximately one-half block east of the site.

On April 27, 2007, the BS&E Department issued a "stop work" order, cancelling the permit. Because the properties were located in a main street overlay area, the BS&E Department could not approve a permit application unless the Detroit Planning and Development Department verified that the work was consistent with the design standards of the subdivision. In a separate action in the Wayne Circuit Court, GPP sought a writ of mandamus to reinstate the demolition permit, but the circuit court denied the request.

In May 2007, the Jefferson Avenue Business Association asked the Detroit City Council (the council) to establish an interim historic district in the area that includes the properties in question. The council designated the area as an interim historic district and directed the Historic Designation Advisory Board to study whether the area met the criteria for historic-designation status. The council also directed the DHD commission to review applications for building and demolition permits within the interim historic district, in accordance with the Local Historic Districts Act (LHDA), MCL 399.201 *et seq.*

On April 18, 2008, GPP applied to the DHD commission for permission to demolish the buildings on the subject properties. The application noted that MCL 399.205(6) permits demolition for various reasons, including where “[t]he resource constitutes a hazard to the safety of the public or to the structure’s occupants.” GPP attached to its application an affidavit of Ronald Supal, a building inspector, plumbing inspector, and mechanical inspector for GPP. Based on his inspection of the properties on April 9, 2008, and April 15, 2008, Supal opined that “[t]he properties have become unsafe, unsanitary and lack adequate light and ventilation. These conditions constitute a fire hazard and are otherwise dangerous to human life and public welfare.” He found building code violations in every category and stated that “[e]ven if the buildings were to be rehabilitated, they would fall far short of the requirements for fire safety, means of egress and general safety.” Supal concluded that “the Properties must be demolished. There is no other feasible alternative.” Attached to Supal’s affidavit were a summary sheet and checklist documenting Supal’s findings of building-code violations and photographs Supal had taken of the interiors of the buildings. At the DHD commission’s request, GPP supplemented its application with a structural engineering report regarding the buildings by Jack Durbin, professional engineer, dated April 23, 2008, which stated in its entirety:

On April 22, 2008, I conducted a structural inspection at the above addresses. I found the buildings to be stressed and in structural failure. I also found the structures to be unsafe, uninhabitable, unsanitary and a public hazard and nuisance.

In my opinion, these structures cannot be economically rehabilitated. Therefore I recommend that these structures be razed immediately.

Susan McBride, a staff member on the DHD commission, prepared a report noting that GPP had submitted no cost estimates for rehabilitation. McBride further observed that the proposed historic district “is a gateway into Detroit from the Grosse Pointes and is one of the few remaining commercial districts that reflect commercial architecture and suburban development on the east side of Detroit during the 1920’s.” McBride recommended that the DHD commission deny the request to demolish the buildings because it did not meet the United States Secretary of the Interior’s standards for rehabilitation.

On May 14, 2008, the DHD commission held a public hearing regarding GPP’s application. McBride and several other persons spoke in opposition to GPP’s request to demolish the buildings. The DHD commission voted unanimously to deny GPP’s application because it did not meet the Secretary of the Interior’s standards. On May 16, 2008, the DHD commission sent GPP a formal notice of denial. The notice stated that a new application could be filed “if the application is corrected, if new information is obtained regarding the application,

or if the scope of work changes.” The notice further advised that GPP could file an appeal with the review board within 60 days of GPP’s receipt of the notice.

On May 27, 2008, the council enacted an ordinance establishing the Jefferson-Chalmers Historic Business District, which includes the subject properties. On July 15, 2008, GPP filed an appeal to the review board, as permitted by MCL 399.205(2). GPP argued that (1) the DHD commission’s decision was arbitrary and capricious because the buildings were in a merely interim historic district when GPP’s application was denied, (2) the buildings were a hazard to the public safety and welfare, and (3) the United States Secretary of the Interior’s standards for rehabilitation did not apply to the buildings. The review board referred the matter to the State Office of Administrative Hearings and Rules (SOAHR) to hold an administrative hearing. Administrative Law Judge Kenneth Poirier (the ALJ) held an evidentiary hearing on January 20, 2009. Nine days later, the ALJ issued a proposal for decision (PFD) concluding that the DHD commission had improperly denied GPP’s request for demolition because the opinions of Supal and Durbin provided substantial evidence to support the request. The DHD commission filed exceptions to the PFD, and GPP responded to the exceptions.

On July 27, 2009, the review board issued a 44-page final decision and order upholding the DHD commission’s denial of GPP’s petition for demolition. As an initial matter, the review board observed that the DHD commission is “constituted by law by experts well versed in a variety of historic preservation disciplines.” The review board noted that it too was comprised of historic preservation experts and indicated “that the ALJ, a lay person with no expertise in historic preservation, misunderstood the review process engaged in by the [DHD commission] and improperly substituted his lay assessment of the information before the [DHD commission], rather than deferring to the administrative and historic preservation expertise of the several members of that body.” Also, the review board concluded that it had legal authority to consider GPP’s application despite the interim status of the historic designation of the properties and that the United States Secretary of the Interior’s standards applied to GPP’s application.

Next, the review board concluded that GPP had failed to establish that the buildings posed a hazard to public safety and welfare because the opinions of Supal and Durbin were not convincing. The review board noted that the degree of deterioration depicted in photographs taken by Supal was “far less severe than is seen in many buildings which are routinely rehabilitated in Detroit. The Commissioners, preservation experts who have reviewed literally thousands of work requests since the Commission’s establishment in 1976, well understood the content and import of the photographs.” Although the photographs depicted “a messy interior,” the review board stated that “clean-up is an ordinary part of historic rehabilitation efforts even when a historic building is in near pristine condition, which few are.” Moreover, the review board noted, the lack of code compliance was a common reason to rehabilitate historic structures: “Virtually all historic buildings by definition fail to meet modern day building and safety codes. The fact that a historic building does not meet the requirements of current regular (e.g., smoke alarm) codes does not in and of itself constitute a distinct safety hazard insofar as a demolition request is concerned.”

The review board also found Durbin’s report inadequate to justify demolition because it contained no specific facts to support or document its ultimate conclusion. “No details whatsoever were furnished, such as a reference to the failure of a particular structural support in

an important structural component of either building, along with an explanation of when and how that structural failure had occurred or was occurring. Absent such corroborating information, the report lacks credibility or reliability.” The review board noted that Detroit Deputy Planning Director Alan Levy and preservation experts from the Michigan Historic Preservation Network and Preservation Wayne had concluded that the buildings appeared to be structurally sound. The board also noted that the buildings have no occupants and have been vacant for four years, and after a homeless person was found in one of the buildings, the buildings were secured by locking the doors and boarding the windows.

Next, the review board concluded that GPP had failed to establish that demolition was necessary to improve or correct any problematic condition. Although GPP had claimed that rehabilitation was not economically feasible, thereby leaving demolition as the only viable option to correct the hazards, GPP’s experts had not submitted any cost estimates or expense projections to validate their views that rehabilitation was not feasible. Persons who spoke at the DHD commission hearing had opined that the buildings could and should be rehabilitated rather than demolished. Finally, the board noted that demolition would be detrimental to the welfare of the citizens of Detroit because federal, state, and local law reflects that preservation of historic resources promotes the public welfare.

GPP filed an appeal in the circuit court pursuant to MCL 399.205(2). On April 29, 2010, the circuit court heard oral argument from the parties and then announced its decision affirming the decisions of the review board and the DHD commission. After summarizing the proceedings, the circuit court stated:

Accordingly, it’s the Court’s conclusion that the Appellant has failed to establish that the Review Board exceeded it’s [sic] authority in rendering its decision and order acted [sic] arbitrarily or capriciously or that it’s [sic] decision and order is not supported by competent, material, and substantial evidence on the record made in this case. Reasonable minds may differ as to what the record does or does not support. However, it is not this Court’s function to substitute it’s [sic] review of the evidence for that conducted by the Board of Review. The Review Board’s decision and order are affirmed.

II. STANDARD OF REVIEW

“This Court’s review of a circuit court’s ruling on an appeal from an administrative decision is limited.” *Buckley v Professional Plaza Clinic Corp*, 281 Mich App 224, 231; 761 NW2d 284 (2008). “This Court reviews a lower court’s review of an agency decision to determine ‘whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency’s factual findings.’” *Dignan v Michigan Pub School Employees Retirement Bd*, 253 Mich App 571, 575; 659 NW2d 629 (2002), quoting *Boyd v Civil Service Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996). “This standard is synonymous with the clear-error standard of review. Under this standard, this Court will only overturn the circuit court’s decision if, on review of the whole record, it is left with a ‘definite and firm conviction that a mistake has been made.’” *Buckley*,

281 Mich App at 231, quoting *Adams v West Ottawa Pub Schools*, 277 Mich App 461, 465; 746 NW2d 113 (2008).

“A circuit court’s review of an administrative agency’s decision is limited to determining whether the decision was contrary to law, was supported by competent, material, and substantial evidence on the whole record, was arbitrary or capricious, was clearly an abuse of discretion, or was otherwise affected by a substantial and material error of law.” *Dignan*, 253 Mich App at 576. “Substantial evidence is that which a reasonable mind would accept as adequate to support a decision.” *In re Kurzyniec Estate*, 207 Mich App 531, 537; 526 NW2d 191 (1994). “Courts should afford due deference to administrative expertise and not invade administrative fact finding by displacing an agency’s choice between two reasonably differing views.” *Dignan*, 253 Mich App at 576.

Statutory interpretation presents a question of law, which is reviewed de novo. *United Parcel Service, Inc v Bureau of Safety and Regulation*, 277 Mich App 192, 202; 745 NW2d 125 (2007). Although an administrative agency’s construction of a statute is entitled to respectful consideration, it is not binding on the judiciary and cannot overcome a statute’s plain meaning. *Id.*; *Buckley*, 281 Mich App at 224, 232. The primary goal in interpreting a statute is to ascertain and give effect to the intent of the Legislature. *United Parcel Service*, 277 Mich App at 202. Judicial construction is not permitted if the plain and ordinary meaning of the statutory language is clear. *Id.*

III. ANALYSIS

GPP argues that the circuit court grossly misapplied the substantial-evidence test to the review board’s findings and that the decisions of the review board and the DHD commission were not supported by competent, material, and substantial evidence. We disagree. In contested administrative proceedings, the proponent of an order or petition generally has the burden of proof and the burden of going forward. *Bunce v Secretary of State*, 239 Mich App 204, 216; 607 NW2d 372 (1999). Here, GPP was the proponent of the issuance of a notice to proceed and thus had the burden of proof and the burden of going forward. GPP relied on the opinions of Supal and Durbin to support its contention that a notice to proceed should be issued under MCL 399.205(6)(a), which permits work¹ within a historic district if the work is necessary to substantially improve or correct a hazard to the safety of the public or to the structure’s occupants.²

The review board found that the opinions of Supal and Durbin were not convincing. The review board stated that the degree of deterioration depicted in Supal’s photographs of the interiors of the buildings was “far less severe than is seen in many buildings which are routinely rehabilitated in Detroit.” The photographs did not indicate that the buildings were “deteriorated

¹ See footnote 4, *infra*.

² A corresponding provision in Detroit Ordinances, § 25-2-22, authorizes the issuance of a notice to proceed on the same grounds as those in MCL 399.205(6)(a).

beyond repair or pose any special hazard to public safety.” Supal’s affidavit did not establish the existence of an inherent building hazard such as “black mold contamination, cock roach [sic] contamination, extensive termite damage, or some other problematic condition threatening immediate human peril which might qualify as dangerous or hazardous *per se*.” Also, Supal’s opinion that the buildings failed to meet code requirements did not establish a distinct safety hazard warranting demolition because “code compliance is one of the most common reasons for the performance of rehabilitation work on historic structures. Virtually all historic buildings by definition fail to meet modern day building and safety codes.” Durbin’s report was also inadequate because it provided no specific facts to support his conclusion that the buildings were in structural failure. “No details whatsoever were furnished, such as a reference to the failure of a particular structural support in an important structural component of either building, along with an explanation of how and when that structural failure had occurred or was occurring.” The lack of corroborating information undermined the credibility and reliability of Durbin’s report, particularly given statements by Levy and preservation experts that the buildings were structurally sound and could be rehabilitated.³ The review board further noted that the buildings had been vacant for four years and that GPP had secured the buildings by locking the doors and boarding the windows to keep the public out.

The review board recognized that even if GPP had established that the buildings posed a hazard to the safety of the public or any occupants, a notice to proceed could not be issued unless the proposed work was “necessary to substantially improve or correct” the condition of the buildings. MCL 399.205(6). Although Supal and Durbin opined that rehabilitating the buildings in lieu of demolishing them was not economically feasible, “neither of them offered any financial cost estimates or expense projections to validate their views.” Levy and a developer had stated at the DHD commission meeting that the properties could be redeveloped. The review board thus found that GPP failed to make an adequate showing that demolition was necessary.

We conclude that the review board’s decision set forth a reasonable view that GPP’s evidence was inadequate to establish that the buildings posed a hazard sufficient to warrant issuance of a notice to proceed. Durbin’s letter offered no specific facts to establish the basis for his opinion that the buildings were in structural failure, unsafe, uninhabitable, and a public hazard and nuisance. Similarly, Supal’s affidavit gave no details to explain why he concluded

³ GPP argues that Levy and the preservation experts who appeared at the DHD commission meeting were inadequate as witnesses. For example, GPP argues that Levy was not a professional engineer or building code expert. However, “a somewhat relaxed evidentiary standard applies to administrative hearings: ‘[T]he rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable, but an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.’” *Becker-Witt v Bd of Examiners of Social Workers*, 256 Mich App 359, 365; 663 NW2d 514 (2003), quoting MCL 24.275. The review board’s reliance on the statements of the witnesses in question was not improper under this somewhat relaxed standard. In any event, the review board’s analysis focused primarily on the inadequacy of the evidence submitted by GPP, the party that bore the burden of proof.

that the buildings were dangerous to human life and public welfare. Although Supal documented his findings of building-code violations, the review board explained that historic buildings by their nature require work to comply with building codes and that the failure to meet current codes does not establish a distinct safety hazard warranting demolition. Finally, the review board adequately explained why, even if a hazard existed, GPP's evidence failed to show that demolition was necessary to substantially improve or correct the conditions of the buildings.

No basis exists to displace the review board's findings. The review board reasonably concluded that GPP failed to present adequate evidence in support of the requirements for issuing a notice to proceed. Thus, the circuit court's decision to affirm the review board's findings does not reflect a misapprehension or gross misapplication of the substantial-evidence test.

GPP argues that the circuit court failed to address a substantial and material error of law committed by the DHD commission when the commission applied the United States Secretary of the Interior's standards for rehabilitation (the Interior standards). GPP argues that the Interior standards apply only to a request for a certificate of appropriateness (dealing with rehabilitating historic resources), and not to a request for a notice to proceed (dealing with demolishing buildings).⁴ We assume, without deciding, that GPP's argument on this point is correct. Even though the circuit court failed to correct the assumedly erroneous administrative conclusion that the Interior standards apply to a notice to proceed, the court's ultimate decision was correct. As noted, the review board found that GPP's evidence in support of its request for a notice to proceed under MCL 399.205(6) was not convincing, and the circuit court did not misapprehend or grossly misapply the substantial-evidence test in affirming the review board's finding. Even disregarding the issue of the Interior standards, the circuit court correctly affirmed the review board's decision that GPP did not satisfy the requirements for issuing a notice to proceed, and appellate relief is unwarranted.

GPP also argues that it was not required to prove that the buildings posed an *immediate* or *imminent* hazard to the public. GPP is correct that a notice to proceed does not require proof that a hazard poses an imminent or immediate threat, but the tribunals below did not expressly conclude otherwise. MCL 399.205(6) provides:

Work within a historic district shall be permitted through the issuance of a notice to proceed by the commission if any of the following conditions prevail and if the proposed work can be demonstrated by a finding of the commission to be necessary to substantially improve or correct any of the following conditions:

⁴ The phrases "certificate of appropriateness" and "notice to proceed" are defined in MCL 399.201a. A "certificate of appropriateness" is "the written approval of a permit application for work that is appropriate and that does not adversely affect a resource." MCL 399.201a(b). A "notice to proceed" is "the written permission to issue a permit for work that is inappropriate and that adversely affects a resource, pursuant to a finding under section 5(6) [MCL 399.205(6)]." MCL 399.201a(n). "'Work' means construction, addition, alteration, repair, moving, excavation, or demolition." MCL 399.201a(v).

(a) *The resource constitutes a hazard to the safety of the public or to the structure's occupants.*

(b) The resource is a deterrent to a major improvement program that will be of substantial benefit to the community and the applicant proposing the work has obtained all necessary planning and zoning approvals, financing, and environmental clearances.

(c) Retaining the resource will cause undue financial hardship to the owner when a governmental action, an act of God, or other events beyond the owner's control created the hardship, and all feasible alternatives to eliminate the financial hardship, which may include offering the resource for sale at its fair market value or moving the resource to a vacant site within the historic district, have been attempted and exhausted by the owner.

(d) Retaining the resource is not in the interest of the majority of the community. [Emphasis added.]

A similar provision is contained in Detroit Ordinances, § 25-2-22.

The plain language of the provisions requires the issuance of a notice to proceed if the resource constitutes a hazard to the safety of the public or the building's occupants and if the proposed work is necessary to substantially improve or correct the condition. There is no requirement that the hazard pose an imminent or immediate threat. A court may not read into a statute anything that is not within the clear intention of the Legislature as gathered from the statute itself. *United Parcel Service*, 277 Mich App at 202. However, the circuit court, the review board, and the DHD commission did not specifically rule that the hazard must pose an immediate or imminent threat.

It is true that the review board used the terms "imminent" and "immediate" at certain points when discussing the alleged hazard. For example, the review board stated that neither the LHDA nor the Detroit ordinances "prescribe the means by which applicants must demonstrate imminent hazard to the satisfaction of the Commission" Also, in its conclusion, the review board stated that GPP had "failed to carry its burden of proving that the buildings in question constitute an immediate safety hazard or pose a threat⁵ to the safety of building occupants and/or the general public" Although the review board's description of GPP's burden under MCL 399.205(6) and Detroit Ordinances, § 25-2-22, was perhaps imprecise at times, we do not view the review board's language, viewed in its entirety, as expressing a legal conclusion that the provisions require proof that the hazard is immediate or imminent. Indeed, the review board, at pages 36-39 of its opinion, cited and analyzed the correct standards. Moreover, it is possible that the review board chose to use the terms "immediate" and "imminent" at certain points because

⁵ We note that the review board did not use the phrase "immediate threat" or "imminent threat" here.

GPP's own expert, Durbin, had stated that he recommended "that these structures be razed *immediately*" (emphasis added).

We also note that the review board did not find that a hazard existed that failed to qualify as immediate or imminent. Instead, the review board found that the opinions of Supal and Durbin were not convincing and that GPP had failed to establish that demolition was necessary to substantially improve or correct any problematic condition. The circuit court correctly upheld this decision. Under all the circumstances, we find no basis for reversing the circuit court's ruling.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Joel P. Hoekstra
/s/ Patrick M. Meter