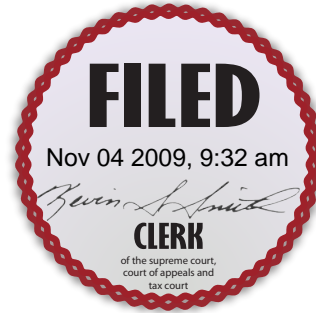


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEYS FOR APPELLANT:

JON LARAMORE
SARAH JENKINS
Baker & Daniels
Indianapolis, Indiana

ATTORNEYS FOR APPELLEES:

JONATHAN L. MAYES
MARC PE-CAINE SULTZER
City of Indianapolis and Indianapolis
Historical Preservation Commission
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

CLAYTON C. MILLER,)
)
Appellant-Writ Petitioner,)
)
vs.)
)
CITY OF INDIANAPOLIS and INDIANAPOLIS)
HISTORIC PRESERVATION COMMISSION,)
LARRY JONES and TEAGEN INVESTMENTS II,)
LLC)
)
Appellees-Respondents.)

No. 49A05-0902-CV-97

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Michael D. Keele, Judge
Cause No. 49F12-0712-MI-54171

November 4, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

This case involves the grant of a zoning use variance in favor of Larry Jones and Teagen Investments II, LLC (collectively, Jones) by the Indianapolis Historic Preservation Commission (the Commission) for property located at 901 North East Street (the Real Estate) in the historic residential neighborhood of Chatham-Arch near downtown Indianapolis. Clayton C. Miller, one of the remonstrators below and a homeowner whose property adjoins the Real Estate, appeals the grant of the use variance, which was affirmed by the trial court.

We affirm.

Although the Real Estate is zoned D-10 for residential use, it has not been put to such a use since at least 1971. Rather, a forty-bed nursing home was built on the Real Estate by a former owner in 1971, pursuant to a zoning use variance issued that same year. After the nursing home's construction, the neighborhood was placed on the National Register of Historic Places in 1980. Two years later, the Commission designated the Chatham-Arch neighborhood as a locally protected historic district "for the purpose of preserving the surviving historic resources, encouraging sensitive new development, and protecting the general residential character of the neighborhood." *Appendix* at 626-27. Coinciding with this renewed focus on preserving the historic neighborhood, the Chatham-Arch Neighborhood Association (the CANA) was created. CANA worked with the Commission to develop a comprehensive preservation plan, which was thereafter administered by the Commission.

Jones acquired the Real Estate in 2002 and successfully obtained a zoning use variance to use the existing building located thereon for twenty leasable studio spaces for

artists, office and meeting space, a gallery space with retail sales, and an apartment for the building's residential manager. The regular business/public hours for the studio spaces and the gallery space were limited under the 2002 use variance.

In 2006, the Commission and the City of Indianapolis replaced the 1982 comprehensive preservation plan with a new plan governing a larger area, which encompassed the boundaries of the Chatham-Arch neighborhood and the historic Massachusetts Avenue cultural district. This new plan is the Chatham-Arch Massachusetts Avenue Historic Area Preservation Plan (the CAMA Plan).

The CAMA Plan divides the property under its authority into three separately defined subareas, each with distinct land use and development recommendations: Subarea A, Residential Core; Subarea B, Commercial Areas;¹ and Subarea C, Adaptive Reuse Areas.² The Real Estate falls within the western boundary of Subarea A, as well as on the western boundary of the total twenty-block area under the CAMA Plan. The Residential Core, Subarea A, "covers the majority of Chatham-Arch and primarily consists of single-family and two-family dwellings, although there are several multifamily dwellings and non-contributing buildings scattered throughout the subarea." *Id.* at 327.

¹ These areas are primarily south and east of Subarea A, along Massachusetts Avenue. The CAMA Plan describes Massachusetts Avenue as the primary commercial corridor with a variety of businesses, public services, offices, and residential and mixed-uses.

² These areas are to the south and east of Subareas A and B. Much of the land in this area, according to the CAMA Plan, contains industrial buildings, although there are a few commercial and residential structures scattered throughout.

The existing building on the Real Estate is a non-contributing, commercial structure, for which the CAMA Plan provides a site-specific recommendation. It recommends that if the building is ever demolished, any redevelopment should start by researching the historic development on the site and that new development may be higher density residential, such as townhouses. The properties directly to the north and south of the Real Estate along East Street are also non-contributing, commercial structures for which the CAMA Plan offers the same redevelopment recommendations.

In 2007, Jones sought to redevelop the Real Estate. He initially proposed two options: 1) a two-story commercial/residential structure and 2) a multi-story apartment complex. After seeking neighborhood input, Jones chose to pursue a use variance for the first option. On May 2, 2007, Jones applied to the Commission for approval to replace the then-existing structure on the Real Estate with a larger structure³ to be known as the Chatham Center. The final plans for the Chatham Center called for nine residential apartments on the second floor and primarily commercial space (four commercial bays) on the first floor with two townhouse units on the south end. The store fronts were to be along East Street and the townhomes were planned to face Ninth Street.

With respect to the use variance,⁴ Jones requested approval for commercial uses

³ In this redevelopment, Jones intended to reuse a portion of the existing structure, with substantial modifications, and add a second floor. Contrary to Miller's repeated representations on appeal, there is no evidence in the record that Jones intended to demolish the existing structure to start anew. Further, we observe that Miller's reliance on representations made by him in pleadings before the certiorari court do not constitute facts and his reliance thereon is improper.

⁴ Jones also sought approval for a variance of development standards, the granting of which is not challenged on appeal.

permitted under a C-3 zoning classification, with certain express exclusions,⁵ as well as the inclusion of business uses described as spa or massage therapy and exercise facility. The goal of the variance was to “provide for the successful operation of Office, Medical or Retail types of businesses which provide services of use and value to the adjoining neighborhood.” *Id.* at 208. The proposed hours of operation were from 7:00 a.m. to 9:00 p.m. Monday through Saturday and 10:00 a.m. to 6:00 p.m. on Sunday.

During the approval process, Jones went to great lengths to appease neighbors, as well as members of the Commission, by altering the exterior design of the proposed building, reducing the amount of commercial space originally planned, and making a number of commitments to alleviate additional concerns of neighbors. Ultimately, neighborhood support/opposition for the project was split. Remonstrators were concerned that the commercial aspect of the Chatham Center would negatively impact the residential character of and plan for the neighborhood. On the other hand, supporters liked the idea of a two-story mixed-use building on the site rather than an eight-story apartment complex, which they believed was not in the best interests of the neighborhood. Three supporters expressed their support to the Commission as follows:

The bottom-line for our support involves 1) a project that develops quality housing for moderate income individuals (eleven apartment units), 2) a project that ensures increased density and mixed use development for an economically and socially diverse urban environment, 3) a project that is well planned providing an aesthetically pleasing urban experience, and 4) a project which secures four businesses that provide essential services and contributes to the economic development of the Chatham Arch Neighborhood.

⁵ Specifically excluded uses included, among others, restaurants, bars, taverns, liquor stores, food sales, drug stores, pawn shops, check cashing stores, automobile service stations, and tattoo parlors.

Id. at 138.

Several contested hearings were held by the Commission, with the final hearing on November 7, 2007. The Commission's staff recommended approval of the mixed-use project. The detailed staff report provided the following regarding the area surrounding the Real Estate along East Street:

Historically, the subject property and surrounding area was occupied by single-family, two-family, and multi-family residential structures. There was a small commercial/industrial node at the nearby intersection of 10th Street and Fort Wayne Avenue. However, between the late 1950's [sic] and the early 1970's [sic] the majority of single and two-family dwellings were demolished and replaced with office, commercial, high-rise public housing, a planned-unit development, and a day nursery. In addition, the streets in the area have been reconfigured to make East Street a primary arterial, currently directing traffic one-way south. For these reasons, *much of the surrounding area has lost its primarily residential character.*

Id. at 188 (emphasis supplied). The staff recommended granting the use variance for the following reasons:

1. The applicant can provide adequate parking for the commercial uses in addition to the residential use....
2. The variance of use request excludes controversial commercial uses allowed in the C-3 ordinance....
3. The existing building lends itself to commercial uses since it was constructed as a nursing home.
4. Commitments are proposed limiting the hours of operation, signage, and lighting....

Id. at 190. In light of the CAMA Plan, the report further provided:

Although the plan recommends residential use for this site if the building were to be demolished, staff believes that consideration should be given to the fact that the applicant is working with the existing building. Other factors supporting mixed uses for this unique site include the location of the building on a busy thoroughfare, the history of uses on the site, proximity to other

commercial buildings to the north, south and west of the site and the types of uses being proposed.

Id.

In speaking about the changing character of this portion of the Chatham Arch neighborhood (along the western boundary), the Commission's President, Jim Kienle, stated at the November hearing:

[A]s far as the plan is concerned, the plan can't anticipate everything. It is a guideline. It's not a bible, and it's meant to guide us in our deliberations here. This area along East Street, it's a transitional area. You have institutional uses across the street, a high density, high-rise building, a [sic] institutional use in the Red Cross, and different commercial uses as you go farther down the street. It has an office building next to it. It's to me, it's very different than the interior residential core of the area. I'd have a far different feeling about it if this were being proposed, for instance, on Park Avenue.

Id. at 607. Another commissioner followed by commenting:

I, too, feel that this is in fact a transitional area. I know that the plan may in fact indicate that it's a residential area. But I think that it's obvious by [Kienle's] citations of the different uses that are running along East Street, and the fact that this building is trying to mitigate itself with a commercial use, and then as it turns the corner on 9th it changes to a residential use on the first floor, it still has residential on the second level across the entire building, I feel it actually is trying to respond to that transitional area that it really is I think in.... I have supported it before and I'm going to continue to support it because I think it's going to be ultimately good for the neighborhood.

Id. at 608.

At the conclusion of the November hearing, the Commission voted 6-2 to grant the requested use variance. As required by Ind. Code Ann. § 36-7-4-918.4 (West, PREMISE

through 2009 Public Laws approved and effective through 4/20/2009),⁶ the Commission issued the following written findings of which only the last three are challenged:

1. The grant will not be injurious to the health, safety, morals, and general welfare of the community because:

Grant will allow for the renovation of and improvements to an existing non-contributing structure in a Historic District.

2. The use and value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner because:

Structure was constructed as a Nursing Home in the mid 1960's. Current use provides for Rental Office Suites, Retail Gallery Space and Residential Apartment. Renovation of structure will redirect the access for the Commercial Uses towards East Street and away from the adjoining Residential structures. Addition of 2nd Floor Apartment Units will provide additional buffering of vehicular noise from East Street.

3. The need for the variance arises from some condition peculiar to the property involved and the condition is not due to the general condition of the neighborhood because:

Current zoning is D-10. Existing building is unsuitable for use as a high density multi-family dwelling. Current D-10 does not allow for commercial uses similar to those provided for in a C-3 zoning classification.

4. The strict application of the terms of the zoning ordinance constitutes an unusual and unnecessary hardship if applied to the property for which the variance is sought because:

There is sufficient land available for a multi (6 to 7) story residential structure.

⁶ Pursuant to I.C. § 36-7-4-918.4, a variance of use may be approved only upon a determination in writing that:

(1) the approval will not be injurious to the public health, safety, morals, and general welfare of the community;

(2) the use and value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner;

(3) the need for the variance arises from some condition peculiar to the property involved;

(4) the strict application of the terms of the zoning ordinance will constitute an unnecessary hardship if applied to the property for which the variance is sought; and

(5) the approval does not interfere substantially with the comprehensive plan....

General neighborhood request is to provide a lower profile type structure. Multi Story structure would most likely include 30 to 35 residential units and require the balance of the open lot to be constructed as a parking lot.

5. The grant does not interfere substantially with the Comprehensive Plan because:

Comprehensive plan allows for commercial/retail uses in the general neighborhood area.

Id. at 490.

On December 7, 2007, Miller, Gary Pike, and Lynn Pike (remonstrators living on North Park Avenue within the same block as the Real Estate) sought judicial review of the variance by filing a Writ of Certiorari in the Marion Superior Court. Following a hearing held on November 13, 2008, the certiorari court affirmed the Commission's grant of the zoning use variance. Miller, alone, now appeals, claiming the record lacks evidence to support three of the Commission's findings.

In this case, the Commission acted as the Metropolitan Board of Zoning Appeals (the BZA), and therefore the parties agree that the standard of review applicable to the BZA applies to the Commission's decision. "When reviewing a decision of a zoning board, we are bound by the same standard of review as the certiorari court." *Hoosier Outdoor Adver. Corp. v. RBL Mgmt., Inc.*, 844 N.E.2d 157, 162 (Ind. Ct. App. 2006) (quoting *S & S Enterps., Inc. v. Marion County Bd. of Zoning Appeals*, 788 N.E.2d 485, 489 (Ind. Ct. App. 2003), *trans. denied*), *trans. denied*. Ind. Code Ann. § 4-21.5-5-14 (West, PREMISE through 2009 Public Laws approved and effective through 4/20/2009) establishes the scope of judicial review and specifically provides that a court may grant relief only if the agency action is: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to

constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence. I.C. § 4-21.5-5-14(d). *See also Hoosier Outdoor Adver. Corp. v. RBL Mgmt., Inc.*, 844 N.E.2d 157. Further, I.C. § 4-21.5-5-14(a) places the burden of demonstrating the invalidity of agency action on the party asserting the invalidity. In the instant case, Miller essentially argues that the decision was arbitrary, capricious, or an abuse of discretion.

On review, we begin with the presumption that the decision of the Commission, as an administrative agency with expertise in zoning and historic preservation matters, is correct. *See Snyder v. Kosciusko County Bd. of Zoning Appeals*, 774 N.E.2d 550 (Ind. Ct. App. 2002), *trans. denied*. Further, we will not reweigh the evidence, reassess the credibility of witnesses, or substitute our judgment for that of the Commission. *Id.* “Only if the board’s decision is arbitrary, capricious or an abuse of discretion should it be reversed.” *Id.* at 552. To obtain a reversal of the grant of a variance, “an appellant must show that ‘the quantum of legitimate evidence was so proportionately meager as to lead to the conviction that the finding and decision of the [b]oard does not rest upon a rational basis.’” *Id.* (quoting *Boffo v. Boone County Bd. of Zoning Appeals*, 421 N.E.2d 1119, 1126-27 (Ind. Ct. App. 1981)).

Miller argues that the record lacks evidence to support three of the findings the Commission was statutorily required to make to justify the variance. He specifically asserts: “In this case, [Jones’s] use variance must be reversed because the evidence presented to satisfy three of the five statutory prerequisites is so meager as to lead to the conviction that

the finding and decision of the Commission has no rational basis and therefore the granting of such a variance exceeded the Commission's statutory authority." *Appellant's Brief* at 21.

When determining whether an administrative decision is supported by substantial evidence, we must determine from the entire record whether the agency's decision lacks a reasonably sound evidentiary basis. Evidence is considered substantial if it is more than a scintilla and less than a preponderance. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Snyder v. Kosciusko County Bd. of Zoning Appeals, 774 N.E.2d at 552 (citations omitted).

Miller initially challenges the Commission's third finding:

The need for the variance arises from some condition peculiar to the property involved and the condition is not due to the general condition of the neighborhood because:

Current zoning is D-10. Existing building is unsuitable for use as a high density multi-family dwelling. Current D-10 does not allow for commercial uses similar to those provided for in a C-3 zoning classification.

Appendix at 490. Miller does not disagree that the Real Estate is now zoned D-10, which allows for high-density residential use, or that the existing building is not suitable for such use. Miller's argument is based, in large part, upon his claim that Jones did not rehabilitate the existing building but rather "razed that building and ha[s] constructed a new building."

Appellant's Brief at 21. The evidence in the record, however, indicates that Jones did not intend to demolish the existing building. On the contrary, the evidence before the Commission indicated that Jones was "working with the existing building", while making substantial modifications and adding a second floor. *Appendix* at 190.

Since at least 1971, the Real Estate has been used for commercial or mixed-use purposes. In fact, there is evidence in the record that the portion of the neighborhood along

East Street lends itself to such uses, with East Street being a primary thoroughfare. Moreover, one can reasonably conclude from the record that the existing structure was not suitable for residential use, particularly for the proposed high-density, multi-family dwelling. While the Commission could have certainly found otherwise,⁷ we conclude that the Commission's finding that the need for the variance arose from a condition peculiar to the property is supported by evidence in the record and is not arbitrary, capricious, or an abuse of discretion.

Miller next challenges the fourth finding of the Commission:

The strict application of the terms of the zoning ordinance constitutes an unusual and unnecessary hardship if applied to the property for which the variance is sought because:

There is sufficient land available for a multi (6 to 7) story residential structure. General neighborhood request is to provide a lower profile type structure. Multi Story structure would most likely include 30 to 35 residential units and require the balance of the open lot to be constructed as a parking lot.

Appendix at 490. In light of this finding and our review of the record, it is evident that the Commission's primary focus was on what it believed to be in the best interest of the neighborhood. The Commission felt that the proposed project was good for the neighborhood, as opposed to a multi-story apartment building that was within the zoning parameters.

⁷ Miller relies upon *Maxey v. Board of Zoning Appeals*, 480 N.E.2d 589 (Ind. Ct. App. 1985), *trans. denied*, for the proposition that to establish the peculiar condition factor a petitioner for a use variance must present evidence that he has explored and exhausted other alternative uses of the property that would conform with the zoning ordinance. This is too broad of a reading of *Maxey*, a case in which we affirmed the denial of a use variance and held that the appellants/developers had not met their difficult burden of unequivocally establishing the existence of this factor as a matter of law. *Id.* Given that zoning boards are granted broad discretion, it is axiomatic that our affirmance of the denial of the variance in *Maxey* does not suggest that we would have reversed had the board granted the variance.

Contrary to Miller's assertions on appeal, the sole inquiry under this factor is not whether Jones could reasonably use the Real Estate under its current use or in some manner that would conform to the D-10 zoning ordinance. In *Burcham v. Metro. Bd. of Zoning Appeals Div. I of Marion County*, 883 N.E.2d 204 (Ind. Ct. App. 2008), we also considered the hardship to the others, not just the land owner. With respect to this factor, we explained:

Because of the location's zoning status, Celebration will be unable to utilize the current location for the sale of fireworks unless the variance is granted. Requiring Celebration to move its business from the location where it has been for twenty years could reasonably be viewed as an "unnecessary hardship," especially when Celebration agreed to a number of commitments indicated to eliminate any fire safety concerns for the surrounding neighbors, when the retail nature of Celebration's business is in accord with the surrounding retail uses, and when numerous neighbors signed letters of support for the variance to keep Celebration in their neighborhood. The testimony in the record also suggests Celebration has long-standing customers who visit this site to buy fireworks and who would be inconvenienced if Celebration were required to stop selling fireworks.

Id. at 217. Thus, our decision did not turn on whether the property could reasonably be put to a conforming use.

This case is similar to *Burcham* in many ways, though we acknowledge there was no redevelopment proposed in that case. Here, the Real Estate has not been used as zoned (that is, residentially) since at least 1971, and there are a number of other nearby commercial uses along East Street. Moreover, there is general neighborhood support for the project, and the developer has made a number of commitments to the neighbors to gain such support. In sum, the record indicates that Jones has proposed a mutually beneficial project that the

Commission, as well as many neighbors, believed was desirable for the neighborhood.⁸ There was also evidence in the record indicating that a denial of the variance could result in a hardship to the neighborhood, whether the hardship came as a multi-story apartment complex or the continued existence of the non-contributing existing structure. *Cf. Bd. of Zoning Appeals of the City of Whiting v. McFadden*, 337 N.E.2d 576, 580 (Ind. Ct. App. 1975) (“the Board must consider the public interest as well as the hardship to the applicant”).

Finally, with regard to the fifth factor, the Commission found:

The grant does not interfere substantially with the Comprehensive Plan because:

Comprehensive plan allows for commercial/retail uses in the general neighborhood area.

Appendix at 490. Miller argues that the grant of the variance will substantially alter the character of the Chatham-Arch neighborhood, which the CAMA Plan sought to protect from commercialization, by “erod[ing] the uniquely residential character of the Chatham Arch”. *Appellant’s Brief* at 30.

Miller correctly observes that the Chatham-Arch and Massachusetts Avenue areas are uniquely different and that their physical, economic, and social environments are different.

To be sure, the CAMA Plan provides:

Chatham-Arch is *primarily* a residential neighborhood that is comprised of single, two-family and multifamily housing. In contrast, Massachusetts Avenue contains a variety of land uses, including commercial, retail, residential, office, governmental, and industrial, and offers numerous shopping, dining, cultural and entertainment venues.

⁸ For example, the project would bring more affordable housing into the area and would secure businesses that would provide essential services to the neighborhood.

Appendix at 626 (emphasis supplied). The Chatham-Arch neighborhood, however, is not exclusively residential and has a number of non-contributing structures, several of which are on East Street along the western boundary of the neighborhood. While the CAMA Plan offers a site-specific *recommendation* for redevelopment on the Real Estate, as well as recommendations for other non-contributing structures, the plan specifically provides that such recommendations “are meant to guide, not mandate, and are to be used as tools in developing actions and strategies for future decisions.”⁹ *Id.* at 26.

Here, the Commission determined that although the Real Estate was within the residential core subarea of the CAMA Plan, the granting of the variance would not substantially interfere with the CAMA Plan. As set out in detail above, the record reveals that the Real Estate contained a non-contributing structure that had been used commercially or for mixed uses for a number of years. Further, there are multiple indications in the record that the area along East Street, a primary arterial, and within the western boundary of the subarea has “lost its primarily residential character” and has become more of a transitional area. *Appendix* at 188. In light of the evidence favorable to the Commission’s findings and decision, we cannot agree with Miller that the variance will substantially alter the character of the area. Further, although the CAMA Plan recommends townhomes for any future redevelopment on the Real Estate, it was within the Commission’s discretion to determine

⁹ The Foreword of the CAMA Plan also provided in part: “the [Commission] will continue to strive ‘to interpret the guidelines and standards of the preservation plan with as much respect, fairness, objectivity, common sense, and consistency as the combined good judgment of the Commission membership can provide.’” *Id.* at 624.

that the proposed mixed use (which included two townhomes and nine apartments) did not substantially interfere with the plan and was ultimately good for the neighborhood.

It is clear from the record before us that the Commission carefully considered the proposed variance. The Commission's decision to grant the variance was neither arbitrary, capricious, nor an abuse of discretion.

Judgment affirmed.

BAKER, C.J., and RILEY, J., concur.