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IN THE
COURT OF APPEALS OF INDIANA

MARIA BODOR, Appellant-Petitioner, vs. TOWN OF LOWELL, INDIANA; BOARD OF ZONING APPEALS OF THE TOWN OF LOWELL, INDIANA; WILBUR COX, Director of Community Development of the Town of Lowell, Indiana; and FRANK LAGACE, Appellees-Respondents.	)	No. 45A03-1012-PL-666

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Jeffery J. Dywan, Judge
Cause No. 45D11-1003-PL-33

October 26, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Maria Bodor appeals from the trial court's order vacating and lifting its stay of the Town of Lowell's demolition order and affirming the entry of that demolition order. Bodor presents the following issues for our review, which we restate as:

1. Is the trial court's decision to affirm the demolition order arbitrary, capricious, an abuse of discretion, unsupported by the evidence, or in excess of statutory authority?

2. Is the trial court's decision to affirm the demolition order against public interest or public policy?

3. Did the trial court abuse its discretion by imposing conditions in its order staying the demolition order, and by later finding that the stay should be lifted as Bodor did not satisfy those conditions?

We affirm.

The building that is the subject of this litigation is known as the Old Lowell School (the Building) located at 525 East Main Street in Lowell, Indiana. The Building was erected in 1888 and consists of the original 16,200-square-foot building, and a 2,300-square-foot gymnasium addition that was erected in the 1920s. The original building is a two-story structure with a basement that has brick- and stone-masonry-bearing walls and wood floor and roof. The addition is a one-story masonry building with a flat roof. Bodor became the owner of the Building sometime in 1989.

The Building's roof was in need of repairs prior to 2004, and Bodor obtained a permit from the Town of Lowell (the Town) in order to make those repairs. The permit, which was valid for a period of two years, expired before those repairs could be completed. Bodor then entered into a land-sale contract with Frank Lagace[1] for the sale of the Building. Also in 2004, the Town cited Bodor for ordinance violations associated with her ownership and maintenance of the Building and sought fines for those violations. The matter was filed in town court initially, but was transferred to Lake Superior Court on Bodor's request for trial *de novo*.[2]

The complaint filed by the Town on May 13, 2004 alleged that Bodor had been in violation of various ordinances relating to her ownership or occupation of the Building. In particular, the complaint alleged that Bodor was in violation by maintaining a kennel in an area zoned B-1, or business district, limited retail. She was alleged to have violated property maintenance ordinances involving the following: (1) Public nuisance; (2) exterior painting; (3) exterior walls; (4) roofs and drainage; (5) overhang extensions; (6) chimneys and towers; (7) windows and door frames; (8) accumulation of rubbish or garbage; (9) disposal of garbage; (10) stairways; (11) interior walls, floors and ceilings; (12) plumbing; (13) heating; (14) electrical system hazards; (15) electrical equipment installation; (16) safe means of

[1] We note that although Frank Lagace was a party at the trial level, he did not file an Appellee's Brief. Pursuant to Indiana Appellate Rule 17(A), "[a] party of record in the trial court . . . shall be a party on appeal."

[2] The Town, the Board of Zoning Appeals of the Town of Lowell, Indiana (Hearing Authority), and Wilbur Cox (Cox), Director of Community Development of the Town of Lowell, Indiana, have filed contemporaneously with the Appellees' Brief a "Motion to Take Judicial Notice" to which Bodor has not objected. The motion has been held in abeyance for the writing panel to consider and address. We grant the motion and a separate order to that effect follows.

egress; (17) accumulation or storage of hazardous materials; and (18) fire resistance ratings. That complaint was dismissed without prejudice in March 2008 because the Town chose to proceed against Bodor under the unsafe building statute. Ind. Code Ann. § 36-7-9-4 (West, Westlaw current through 2011 1st Reg. Sess.).

On April 23, 2008, Dann Kaiser, a project architect, conducted a building condition assessment of the Building. Kaiser noted that the Building was in good and structurally sound condition because the foundation was adequate and the floor system and roof exceeded the required load capacities. He also noted that while the roof framing was in good condition, there were areas of collapse, excessive leaking, and missing portions of the roof. He stated that additional failures would ensue and that the Building was in need of immediate stabilization to prevent further deterioration and eventual demolition. Kaiser opined in his assessment that without stabilization the Building posed a threat to community health and safety.

Thomas Trulley, the Code Enforcement Officer for the Town, prepared an "unsafe building report" concerning the Building on August 24, 2009. *Appellant's Appendix* at 28. In his report, Trulley determined that the Building was unsafe to person and property due to the presence of hazardous conditions. Those hazardous conditions included falling brick and stone, falling shingles and rotten wood from the roof, broken windows, gutters about to fall, and chimneys about to collapse.

On February 3, 2010, Building Standard Orders were issued to Bodor and Lagace, directing that the Building be removed and scheduling a hearing on the orders for February 23, 2010, at 6:00 p.m. An order was served on Lagace via certified mail on February 12,

2010. Bodor's copy of the order was also sent by certified mail, but was returned unclaimed. Bodor acknowledged that she received actual notice of the order ten days before the hearing. Bodor participated in the hearing and appeared with counsel.

Cox, the Town's Director of Community Development and a certified building official, testified at the hearing that there were unsafe conditions at the Building. Those conditions include: (1) brick facing falling off the Building; (2) cracks in the concrete sill plates of the windows; (3) cracks in the side of the Building, and limestone has fallen off the east side of the Building; (4) windows are broken out and the deteriorated roof allows the Building to be open to the elements; and (5) the interior is filled with storage containers from wall to wall and from floor to ceiling. Cox testified that it was "iffy" that the Building could be saved and because nothing had been done in two years to remedy the problems, the conditions were worsening. *Id*. at 139. Cox stated that none of the issues identified by Kaiser in 2008 had been addressed or corrected, and Cox testified about inspection violation reports from 2004 and previous litigation concerning the condition of the Building.

Trulley testified at the hearing that his 2009 inspection was conducted because the Town was receiving many complaints about the falling brick and shingles blowing onto neighbors' yards. He also testified that one of the main girders was cracked on the east side of the foyer upstairs.

Kaiser performed an exterior evaluation of the Building on February 23, 2010. Kaiser testified at the hearing that the Building remained in need of stabilization. He further testified that by stabilization he meant getting the Building into a condition such that it will not continue to deteriorate so that it is not in danger of collapsing. To that end, the roof

would need repaired, as would the structure, tuckpointing and repair of the masonry would need to be done, as would sealing off windows where the glass was broken out. He stated that a new roof could not be placed on the Building until the structure was first repaired. Before the Building would be suitable for new occupancy, the electrical and mechanical systems would have to be installed and the interior would have to be cleaned out.

Kaiser testified that there were numerous conditions in the Building that were violations of the State Building Code. He also noted that there had been additional deterioration since he performed his 2008 assessment. He estimated that stabilizing the Building would cost between $150,000 and $200,000 with the cost to make the Building usable estimated from between $750,000 to $1,000,000.

At the conclusion of the hearing, the Hearing Authority affirmed the demolition order requiring the removal of the Building. Bodor filed her complaint in Lake Superior Court in which she sought a stay of the demolition order and a *de novo* hearing. Following the hearing, the trial court granted the stay subject to certain conditions: (1) Bodor was to deposit a cash escrow of $200,000 with a title insurance company or with the clerk of the court within thirty days of the order and provide the trial court and all parties with evidence of the deposit within five business days after the deposit; (2) repairs to the roof of the Building were to be made within thirty days of the order; and (3) the repairs necessary to stabilize the Building were to be made on or before May 31, 2011.

The Town filed a motion to lift the stay on December 21, 2010 and a hearing on the motion was scheduled, following which the trial court lifted the stay and affirmed the demolition order. Bodor now appeals.

1.

Bodor claims that the trial court's decision to affirm the demolition order was arbitrary, capricious, an abuse of discretion, unsupported by the evidence, and in excess of statutory authority. We disagree.

I.C. § 36-7-9-8(c) (West, Westlaw current through 2011 1st Reg. Sess.), provides that an appeal from a decision of the hearing authority under the unsafe building law is a de novo action, and the trial court has the option of affirming, modifying, or reversing the action taken by the hearing authority. "[T]he term "de novo" in statutes providing for judicial review of administrative orders does not authorize a trial court to substitute its judgment for that of the agency below." *Kollar v. Civil City of South Bend*, 695 N.E.2d 616, 619 (Ind. Ct. App. 1998).

> A court reviewing under a de novo statutory direction may, to a limited extent, weight the evidence supporting the finding of fact by an administrative agency. But it may negate that finding only if, based upon the evidence as a whole, the finding of fact was (1) arbitrary, (2) capricious, (3) an abuse of discretion, (4) unsupported by the evidence or (5) in excess of statutory authority. Further, the trial court may not substitute its judgment for that of the agency below as the facts are to be determined but once.

Id. (quoting *Uhlir v. Ritz*, 255 Ind. 342, 345, 264 N.E.2d 312, 314 (1970) and *City of Mishawaka v. Stewart*, 261 Ind. 670, 677, 310 N.E.2d 65, 69 (1974)) (internal citations and quotations omitted). The party seeking to overturn an administrative order has the burden of proof. *Kopinski v. Health & Hosp. Corp. of Marion County*, 766 N.E.2d 454 (Ind. Ct. App. 2002).

I.C. § 36-7-9-5 (West, Westlaw current through 2011 1st Reg. Sess.) provides in pertinent part that the enforcement authority of local government may issue an order

requiring action related to unsafe premises including the demolition of an unsafe building if the general condition of the building warrants removal. Here, the evidence established that while Bodor desired to save the Building, she was the legal owner of the Building since 1989, and that the Town identified serious problems including damage to the roof prior to 2004. Bodor's argument (1) that she was selling the Building on contract to Lagace; (2) that he was to conduct the repairs; and, (3) that she had no involvement with the Building until a week and a-half prior to the February 2010 hearing, does not refute the overwhelming evidence of the unsafe condition of the Building, which we have discussed in great detail above. Bodor had notice of the problems at least as early as 2004, but failed to make the necessary repairs. "[W]here a building can be reasonably repaired, it may be improper to order demolition of the property. . . . An equally important consideration is whether the building *will* be repaired." *Kollar v. Civil City of South Bend*, 695 N.E.2d at 622. Given the history of disrepair of the Building, demolition is a reasonable option even in light of the possibility of repair, where there is little probability of repair. Thus, we conclude that the trial court's decision to affirm the Hearing Authority's demolition order was not arbitrary, capricious, an abuse of discretion, unsupported by the evidence, or in excess of statutory authority.

2.

Bodor further argues that the trial court's decision to affirm the demolition order is against the public interest and public policy. Once more, we disagree.

Bodor frames her argument in terms of the public interest and public policy, but advanced only her public interest argument before the trial court. Potential waiver

notwithstanding, we address both concerns advanced by Bodor. Our Supreme Court has stated that "[w]here public policy is not explicit, we look to the overall implications of constitutional and statutory enactments, practices of officials and judicial decisions to disclose the public policy of this State." *Straub v. B.M.T. by Todd*, 645 N.E.2d 597, 599 (Ind. 1994). What constitutes public interest can be defined in a number of ways based on the context. For example, in regard to libel and slander,

> If a matter is subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved or because in some sense the individual did not 'voluntarily' choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety.

Aafco Heating & Air Conditioning Co. v. Northwest Pub'ns, Inc., 321 N.E.2d 580, 586-87 (Ind. Ct. App. 1974) (quoting *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 43 (1971)).

Although in its prime the Building might have been a significant historical landmark, its current condition is unsafe and the Building is rapidly deteriorating. The public policy considerations involved in preserving what was once an historic building or landmark, in this situation are outweighed by the Town's statutory mandate to regulate the use or possession of property that might endanger the public health, safety, or welfare. *See* Ind. Code Ann. § 36-8-2-4 (West, Westlaw current through 2011 1st Reg. Sess.) (regulation of dangerous conduct or property). The evidence before the Hearing Authority and the trial court supports the conclusion that with the falling brick and stone, falling shingles and rotten wood from the roof, broken window, gutters about to fall, and chimneys about to collapse, the public safety was at risk. We conclude that the trial court's decision to affirm the demolition order was not

against the public interest or public policy.

3.

Bodor claims that the trial court abused its discretion by imposing conditions in its order staying the demolition order, and by later finding that the stay should be lifted as Bodor did not satisfy those conditions. In particular, she claims that the trial court did not conduct an appropriate inquiry into her ability to post the necessary cash escrow, or whether her attempts to repair the Building would bring it into compliance.

At the November 10, 2010 hearing on Bodor's motion to stay the demolition order, the trial court inquired about the needed repairs to the Building and about Bodor's financial ability to complete the repairs. Bodor did not object to the trial court's questions and provided the requested information. Bodor argued that she needed additional time to complete the repairs and that she did not want to be required to both make the repairs and post a bond. The trial court addressed those concerns by granting the stay subject to certain conditions: (1) Bodor was to deposit a cash escrow of $200,000 with a title insurance company or with the clerk of the court within thirty days of the order and provide the trial court and all parties with evidence of the deposit within five business days after the deposit; (2) repairs to the roof of the Building were to be made within thirty days of the order; and (3) the repairs necessary to stabilize the Building were to be made on or before May 31, 2011.

The Town filed a motion to lift the stay on December 21, 2010 and a hearing on the motion was scheduled. Bodor admitted that she had not made a deposit into escrow to be used for the repair of the Building. Although the trial court required the repairs to be made

by a licensed contractor, Bodor testified that she and some friends were attempting to stabilize the Building. The trial court lifted the stay and affirmed the demolition order.

I. C. § 36-7-9-18.1 (West, Westlaw current through 2011 1st Reg. Sess.) provides that when reviewing a demolition order, the trial court may condition the grant of a period of time to accomplish certain actions required in the order upon the posting of a performance bond that will be forfeited in the event that the required actions are not completed and the forfeited funds shall be deposited in the unsafe building fund. The trial court did state as follows: "If the work is not done, we're going to use that money to demolish the [B]uilding, by the way. That's where it's going if the work is not done according to the Court's order. All right?" *Transcript* at 32. The trial court's statement is not contrary to law, because pursuant to the statute, if the repairs were not completed, the money deposited in the escrow would be forfeited and deposited in the unsafe building fund. The trial court was not, as Bodor suggests, ordering her to finance the demolition of the Building, but was conditioning the stay upon the accomplishment of certain goals within designated timeframes. Only then, would the money be forfeited and likely used to demolish the Building. We find no error here, as the trial court did not abuse its discretion by imposing conditions in granting the stay or by lifting the stay upon a finding that those conditions were not met.

Judgment affirmed.

DARDEN, J., and VAIDIK, J., concur.