

**MARY ELLEN AND BRUCE
FLEURY**

*

NO. 2018-CA-0306

VERSUS

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COURT OF APPEAL

**THE BOARD OF ZONING
ADJUSTMENTS FOR THE
CITY OF NEW ORLEANS**

*

FOURTH CIRCUIT

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STATE OF LOUISIANA

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2017-12110, DIVISION "N-8"
Honorable Ethel Simms Julien, Judge

Judge Roland L. Belsome

(Court composed of Judge Roland L. Belsome, Judge Joy Cossich Lobrano, Judge Regina Bartholomew-Woods)

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**REVERSED
OCTOBER 24, 2018**

This appeal stems from the trial court's judgment reversing the decision of the City of New Orleans, through the Board of Zoning Adjustments (BZA), to approve a minimum lot width variance. For the reasons set forth below, we reverse the trial court's judgment and re-instate the decision of the Board of Zoning Adjustments.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

In conjunction with a request for a re-subdivision, Sunsin Enterprises, Inc., through Frank Sunsin, applied for two zoning variances to minimum lot width and minimum lot area on lot 23, which is a vacant lot immediately adjacent to 927-29 Sixth Street (lot 22),¹ in New Orleans. Upon finding that all of the necessary criteria were met for the minimum lot width variance, the BZA Staff Report recommended approval of the variance. Conversely, the BZA Staff Report recommended denying the minimum lot area variance request. After a hearing, the BZA accepted the Staff Report recommendation, approving the minimum lot width

¹ The re-subdivision request specifically relates to lots 22 and 23, and re-subdivides the lots into proposed lots 22A and 23A. For clarity purposes, the lots are hereinafter referred to as lots 22 and 23. As discussed, lot 22 bears the municipal addresses of 927-29 Sixth Street. Lot 23, which is vacant, has a proposed municipal address of 925. The variances requested on lot 23 would allow for the construction of a multi-family residence.

variance and denying the minimum lot area variance.² Neighbors, Mary Ellen and Bruce Fleury, appealed the BZA's decision in Civil District Court. After hearing oral arguments, the trial court reversed the BZA's decision to approve the minimum lot width variance. The BZA appealed.

STANDARD OF REVIEW

Summarizing the standard for reviewing decisions of the BZA, this court, in *Ellsworth v. City of New Orleans*, stated as follows:

The jurisprudence has recognized that “the decisions of the BZA, while subject to judicial review under La. R.S. 33:4727(e), are subject to a presumption of validity and are subject to judicial review only as to whether they are arbitrary, capricious or an abuse of discretion.” The jurisprudence has further recognized that “[t]he reviewing court may not simply substitute its own judgment for that of the BZA.” The jurisprudence has still further recognized that it “ ‘is not within the province of the appellate court to second guess a zoning decision that appears to have been based on appropriate and well-founded concerns for the public.’ ”

13-0084, pp. 6-7 (La. App. 4 Cir. 7/31/13), 120 So.3d 897, 902 (internal citations omitted).

In this context, we review the BZA's, not the trial court's, decision. “When reviewing an administrative decision, the district court functions as an appellate court. Since no deference is owed by the appellate court to the district court's fact findings or legal conclusions, the appellate court need only review the findings and decision of the administrative agency.” *Garber v. City of New Orleans Through City Planning Comm'n*, 16-1298, p. 6 (La. App. 4 Cir. 12/13/17), 234 So.3d 992, 997 n.7, writ denied *sub nom.*, 18-0351 (La. 4/20/18), 240 So.3d 924 (citation omitted).

² The BZA's denial of the minimum lot area variance effectively prohibited the applicant from building a multi-family housing unit on the undersized lot 23. However, the approval of the minimum lot width would allow for a single-family unit to be constructed.

LAW AND ANALYSIS

On appeal, the BZA argues that the district court erred in substituting its own judgment for the judgment of the BZA and concluding that the BZA's decision to grant the minimum lot width variance was arbitrary and capricious. We agree.

The only issue before this Court is whether the BZA's decision to approve the minimum lot width variance was arbitrary, capricious, or characterized by an abuse of discretion. *See Ellsworth, supra*. The BZA may authorize a variance only when the evidence presented meets nine criteria set forth in the Article 4, Section 4.6(F) of the Comprehensive Zoning Ordinance (CZO).³ Contrary to the trial court's ruling, the record amply supports the BZA's decision.

The record reveals that the BZA thoroughly investigated the variance request, issuing a detailed Staff Report prior to the hearing. After a brief staff

³ The nine criteria are:

1. Special conditions and circumstances exist that are peculiar to the land or structure involved and are not generally applicable to other lands or structures in the same zoning district.
2. Literal interpretation of the provisions of this Ordinance would deprive the applicant of rights commonly enjoyed by other properties in the same district under the terms of this Ordinance.
3. The special conditions and circumstances do not result from the actions of the applicant or any other person who may have had an interest in the property.
4. Granting the variance requested will not confer on the applicant any special privilege which is denied by this Ordinance to other lands or structures in the same district or similarly situated.
5. The variance, if granted, will not alter the essential character of the locality.
6. Strict adherence to the regulation by the property would result in a demonstrable hardship upon the owner, as distinguished from mere inconvenience.
7. The request for the variance is not based primarily upon a desire to serve the convenience or profit of the property owner or other interested party(s).
8. The granting of the variance will not be detrimental to the public welfare or injurious to other property or improvements in the neighborhood in which the property is located.
9. The proposed variance will not impair an adequate supply of light and air to adjacent property, increase substantially the congestion in the public street, increase the danger of fire, or endanger the public safety.

presentation and public comment period, the BZA adopted the staff recommendation.

During the hearing, there was a comprehensive discussion surrounding the Staff Report and the nine criteria required by the CZO. The BZA staff noted that the criteria were met for the minimum lot width variance; however, they were not met for the minimum lot area variance. In addition, approving the width variance and re-subdivision resulted in the adjoining lot 22 (927-929 Sixth Street) coming into compliance with the setback requirements, as well as resolving an encroachment issue.⁴ The BZA further noted that denying the minimum lot area variance would prevent the applicant from building a multi-family residence on the property. After an opportunity for public comment,⁵ wherein several neighbors contested the variances, the BZA adopted the staff recommendation to approve the minimum lot width variance and deny the minimum lot area variance.

On writ of certiorari, the trial court reversed the decision of the BZA finding it to be arbitrary and capricious. In particular, the trial court reasoned:

The Staff Report was flawed because: it failed to consider that the variance sought in this case was for a width of twenty-four point eight [24.8] feet and four [4] of the nine [9] lots nine referenced in the report were wider than that; it failed to consider the ultimate use of this property - for short term rentals - would likely differ from the uses of the other properties; and, it repeatedly relied on "the illogical assertion" that because the lot was already non-compliant, making it more non-compliant could not create a greater harm.

In addition, the court found that the BZA did not consider all of the factors set forth in Article 4, Section 4.6 F of the CZO as it was

⁴ There was a structure on lot 22 that encroached on lot 23. With the width variance and re-subdivision, the structure on lot 22 would no longer encroach onto lot 23. Moreover, the re-subdivided lot 22 would comply with the existing setback requirements.

⁵ While most neighbors contested the entire application; one neighbor requested that the BZA follow the Staff recommendation. The primary grievance involved the applicant's intended use of the future and existing residences as short-term rentals.

required to do. Specifically, the court found that granting this variance does alter the character of the locality.

The trial court's reasons are misplaced. As suggested by the BZA, the trial court erroneously substituted its own judgment for the judgment of the BZA. *Ellsworth, supra*. Instead of acknowledging that five of nine existing lots either included a greater width variance or a comparable variance to the width variance requested, the trial court reversed these figures to reach the opposite conclusion.⁶ Also converse to the trial court's conclusion, the record establishes that the BZA considered all nine criteria and specifically found the variance would not alter the character of the locality because the "streetscape w[ould] remain unchanged." Additionally, the trial court incorrectly focused on the BZA's failure to consider the potential use of the property for short-term rentals, which is not a proper inquiry in ruling on a variance requested in connection with a proposed lot re-subdivision. Finally, contrary to the trial court's assertion, the BZA noted in its Staff Report that approval of the requested waiver would create a greater non-conformity than already exists on lot 23; however, it reasoned that it resulted in the considerable improvement of lot 22 in terms of setback compliance as well as cured the existing structural encroachment. Accordingly, we find that the BZA's decision was well-reasoned and thoughtfully considered.

Given that the BZA acted reasonably and within its authority, we cannot say that its decision was arbitrary, capricious, or characterized by an abuse of discretion. For these reasons, the judgment of the trial court is reversed and the decision of the BZA to approve the minimum lot width variance is re-instated.

REVERSED

⁶ Regardless, all nine nearby lots were granted a minimum lot width variance to some degree.