[Cite as *Kurtock v. Cleveland Bd. of Zoning Appeals*, 2017-Ohio-8890.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**No. 105755**

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## JULIE KURTOCK

PLAINTIFF-APPELLANT

vs.

## CLEVELAND BOARD OF ZONING APPEALS, ET AL.

DEFENDANTS-APPELLEES

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**JUDGMENT:**
AFFIRMED

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Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-16-863363

**BEFORE:** Blackmon, J., E.A. Gallagher, P.J., and Laster Mays, J.

**RELEASED AND JOURNALIZED:** December 7, 2017

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PATRICIA ANN BLACKMON, J.:

**{¶1}** Julie Kurtock ("Kurtock") appeals from the trial court's judgment affirming the Cleveland Board of Zoning Appeals' ("the BZA") administrative resolution granting a use variance to Karen O'Malley, Inc. ("O'Malley"). Kurtock assigns the following error for our review:

> I. The Cleveland Board of Zoning Appeals below erred in granting a use variance to the applicant.

**{¶2}** Having reviewed the record and pertinent law, we affirm the decision of the trial court. The apposite facts follow.

**{¶3}** In 1999, O'Malley built the Harp, which is a bar and restaurant located in Cleveland and zoned in a local retail business district. Under Cleveland's zoning code, live music is not permitted at the Harp. Cleveland Codified Ordinance ("C.C.O.") 343.01(b)(2)(F). Nonetheless, the Harp had been presenting live music to its patrons since opening. In 2012, O'Malley received a notice of noncompliance from the city and sought a use variance to become code compliant. The city of Cleveland denied O'Malley's request, and O'Malley appealed the denial to the BZA. Kurtock and other Cleveland residents who own and live in houses located near the Harp objected to the variance, complaining about the loud music. The BZA reversed the city and granted O'Malley's request for the variance.

**{¶4}** Kurtock appealed the BZA's decision, and the Cuyahoga County Common Pleas Court affirmed the variance. *Kurtock v. Cleveland Bd. of Zoning Appeals,*

Cuyahoga C.P. No. CV-12-786398 (Aug. 13, 2013). Kurtock appealed the court's ruling, and on May 1, 2014, this court reversed and remanded the case. *Kurtock v. Cleveland Bd. of Zoning Appeals*, 8th Dist. Cuyahoga No. 100266, 2014-Ohio-1836 ("*Kurtock I*"). The remand was twofold: First, the common pleas court was instructed to determine whether Kurtock had standing. On December 1, 2015, the common pleas court issued a decision finding that Kurtock had standing, because her harm was "unique to her and not the public at large."

**{¶5}** Second, this court instructed the BZA to determine "the practical difficulty or unnecessary hardship requirement under Cleveland Codified Ordinances [sic] 329.03(b)." *Id.* at ¶ 15. Inexplicably, this court stated that "additional evidence may be considered upon any remand"[1] despite finding that "[t]he record * * * demonstrates that evidence was offered on this point" at the 2012 hearing. *Id.* at ¶ 19-20.

**{¶6}** On April 18, 2016, the BZA held another hearing, and on May 2, 2016, the BZA issued a "remand resolution" where it addressed the issue of unnecessary hardship. The BZA found that the Harp "would be unable to survive economically without the

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[1]The dissenting judge in *Kurtock I* would have reversed the court's affirming the BZA's granting the variance, finding that O'Malley offered legally insufficient evidence. *Kurtock I* at ¶ 29. "That the board did not make a finding on unnecessary hardship must be viewed as a failure of proof such that a variance could not issue and this case is now over." *Id.* at ¶ 28. *See also* R.C. 2506.03, which states that additional evidence may be introduced in an administrative appeal only under limited circumstances, none of which apply to the case at hand; *Buckley v. Solon*, 8th Dist. Cuyahoga No. 95805, 2011-Ohio-3468, ¶ 41 (when no exception to R.C. 2506.03(A) applies, "there is no reason to 'fill in the gaps' because the transcript is complete," and no reason to take additional evidence).

substantial higher revenue brought in on days in which live music was performed" and granted the variance. Kurtock appealed to the common pleas court again, and on May 2, 2017, the court affirmed the BZA's administrative decision. *Kurtock v. Cleveland Board of Zoning Appeals*, Cuyahoga C.P. No. CV-16-863363 (May 2, 2017). It is from this order that Kurtock appeals.

**Standard of Review — Administrative Board of Zoning Appeals**

**{¶7}** In reviewing an administrative appeal, a common pleas court "may find that the * * * decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record." R.C. 2506.04. The standard of review for an appellate court, however, is limited and "requires that court to affirm the common pleas court, unless the court of appeals finds, as a matter of law, that the decision of the common pleas court is not supported by a preponderance of reliable, probative and substantial evidence." *Kisil v. Sandusky*, 12 Ohio St.3d 30, 34, 465 N.E.2d 848 (1984). *See also Vang v. Cleveland*, 8th Dist. Cuyahoga No. 104994, 2017-Ohio-4187, ¶ 9 (the standard of review for a court of appeals in an administrative zoning case is limited to "questions of law, which does not include the same extensive power to weigh the evidence as is granted to the trial court.").

**{¶8}** Pursuant to C.C.O. 329.03(b), the BZA has the power to grant a zoning variance only when the following conditions have been met:

> (1) The practical difficulty or unnecessary hardship inheres in and is peculiar to the premises sought to be * * * used because of physical size, shape or other characteristics of the premises or adjoining premises which differentiate it from other premises in the same district and create a

> difficulty or hardship caused by a strict application of the provisions of this Zoning Code not generally shared by other land or buildings in the same district;
>
> (2) Refusal of the variance appealed for will deprive the owner of the substantial property rights; and
>
> (3) Granting of the variance appealed for will not be contrary to the purpose and intent of the provisions of this Zoning Code.

**{¶9}** Under C.C.O. 329.03(c), the party seeking the variance "shall state and substantiate his or her claim that the three (3) conditions listed under division (b) of this section exist, and the Board shall make a finding on each of the three (3) conditions as they apply in each specific case for a prerequisite for the granting of the variance."

**{¶10}** Generally, there are two types of variances that pertain to zoning. An area variance, which authorizes deviations from construction and building restrictions, is subject to the less stringent standard of demonstrating that "practical difficulties" exist. *See Kisil v. Sandusky*, 12 Ohio St.3d 30, 31-32, 465 N.E.2d 848 (1984).

**{¶11}** A use variance, on the other hand, "allows land uses for purposes other than those permitted in the district as prescribed in the pertinent regulation * * *." *CBS Outdoor, Inc. v. City of Cleveland Bd. of Zoning Appeals*, 8th Dist. Cuyahoga No. 98141, 2013-Ohio-1173, ¶ 13. To be granted a use variance, the applicant must show that the current zoning ordinance creates an "unnecessary hardship." *Id.* at ¶ 14. This "standard necessarily admits that there is some use for [the] land, but that use works an unnecessary hardship on the landowner." *First N. Corp. v. Bd. of Zoning Appeals Olmsted Falls*, 2014-Ohio-487, 8 N.E.3d 971, ¶ 50 (8th Dist.).

> A zoning board or planning commission which is given the power to grant variances is vested with a wide discretion with which the courts will not interfere unless that discretion is abused. Whether a hardship or exceptional or extraordinary circumstances exist to justify the issuance of a variance is a question of fact to be determined by the zoning board or commission.

*Schomaeker v. First Natl. Bank*, 66 Ohio St.2d 304, 309, 421 N.E.2d 530 (1981).

**{¶12}** "Unnecessary hardship occurs when it is not economically feasible to put the property to a permitted use under its present zoning classification due to characteristics unique to the property." *In re Appeal of Dinardo Constr., Inc.,* 11th Dist. Geauga No. 98-G-2138, 1999 Ohio App. LEXIS 1430 (Mar. 31, 1999).

**Analysis**

**{¶13}** Karen O'Malley testified that the Harp is more profitable on the nights when it has live music, stating that

> [t]he revenues from the days when we have music help to cover losses of lower sales days without music. Many of days without music we break even and in the winter we lose money. Music brings in our guests. The Harp would close if we did not have live music. The loss would be great. * * * Without music, I would lose my business. * * * We need music inside and outside to keep the volume of business.

**{¶14}** O'Malley continued by stating that "[t]he loss to the community would be great. Local jobs and sales tax, City tax, and charitable contributions, and all would cease to exist and the building would be vacant without any value."

**{¶15}** Additionally, the Harp presented evidence that its property "is very much kind of an island on this part of the neighborhood," in that it is surrounded by a water tower and an on-ramp to the shoreway.

**{¶16}** Tom McNair, of Ohio City, Incorporated, testified that not permitting live music puts "the Harp at a competitive disadvantage to not only downtown but to neighboring municipalities, in Lakewood, in any commercial district * * *." McNair further testified that he knows

> how hard it is to bring traditional retail into neighborhoods. As we get more online retailing, things of that nature, kind of the last experiential moment for people is to go and have moments where they can get together, places like the Harp, and if we are not able to grant a Variance for good businesses to be able to have things like live entertainment, we are putting them at a competitive disadvantage to other businesses throughout the region.

**{¶17}** State Representative Martin Sweeney testified that "small business drives our City and our State and the fundamental premise that you have to figure out today is her business going to close if this live music is denied. They say yes, They say no. * * * I believe if the Harp does not have live music, the numbers will not work and it will eventually close."

**{¶18}** Ben Trimble, Senior Director of Real Estate and Planning for Ohio City, Incorporated, testified about the uniqueness of the "specific property" on which the Harp is located:

> [T]o talk about the unnecessary hardship posed by this property specifically, its neighbors are the shoreway, a water tower, and an on-ramp for the shoreway, so I think you can make a very specific case for this property having very unique circumstances from all the other properties surrounding it which is, frankly, attested by the fact that Ms. O'Malley is very much kind of an island on this part of the neighborhood. Councilman Zone talked about how we're seeing sort of a renaissance around this property. I don't think we've reached this point in the neighborhood yet where we talk about a lot of development happening on 58th Street and a lot of development happening on 32nd Street. That's ten to 15 blocks in either

direction. Right now Ms. O'Malley is very much on an island, like a wash in a sea of vacancy * * *.

**{¶19}** At the hearing, the BZA concluded on the record that

[I]t was relevant to hear the placement of the parcel itself and location near a shoreway and an off-ramp for a shoreway or an on-ramp for a shoreway on a street. It is kind of isolated. It is kind of a tough sale, if you will, to make that parcel happen. There is some undue hardship associated with being in a place that is so isolated. It is almost an island * * *. We've had substantial evidence as to the impact on this particular business in addition to, as pointed out * * *, the unique location of this business which I would submit has the effect of diminishing the impact of live music at this location that in the sense that there are three sides of this property and there are virtually no neighbors certainly in terms of residences * * *.

**{¶20}** The BZA's May 2, 2016 resolution finds that

refusal of the variance will create an unnecessary hardship particular to the property such that there will be no economically feasible use without the variances [sic] due to the following:

- The business would be unable to survive economically without the substantial higher revenue brought in on days in which live music was performed.

- The property's unique location geographically as 3 sides of the property have no neighbors which has the effect of diminishing the impact of live music.

- The placement of the property itself is isolated creating an undue hardship in sustaining a business at that location.

- The property is unique in its design as it was built as an Irish pub, and would likely be emp[t]y if the Harp went out of business.

- The music is integrally intertwined in the business and its existence is due to the atmosphere.

- The complainant doesn't have any objection to the indoor live music.

**{¶21}** Furthermore, the BZA reaffirmed its previous findings under subsections (2) and (3) of C.C.O. 329.03(b), namely that without the variance, O'Malley will be deprived of substantial property rights and the variance is "not contrary" to the purpose and intent of the zoning code.

**{¶22}** On appeal of this administrative resolution, this court must affirm the common pleas court, unless we find, "as a matter of law that the decision of the common pleas court is not supported by a preponderance of reliable, probative and substantial evidence." *Kisil v. Sandusky*, 12 Ohio St.3d 30, 34, 465 N.E.2d 848 (1984). Upon review, we find that the common pleas court affirming the BZA's granting O'Malley's variance is supported by reliable, probative, and substantial evidence in the record. Accordingly, Kurtock's sole assigned error is overruled.

**{¶23}** Judgment affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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PATRICIA ANN BLACKMON, JUDGE

EILEEN A. GALLAGHER, P.J., and

ANITA LASTER MAYS, J., CONCUR