[Cite as *Smith Family Trust v. Hudson Bd. of Zoning & Bldg. Appeals*, 2009-Ohio-2557.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

SMITH FAMILY TRUST

Appellant

v.

CITY OF HUDSON BOARD OF ZONING AND BUILDING APPEALS

Appellee

C. A. No. 24471

APPEAL FROM JUDGMENT ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2007-05-3641

DECISION AND JOURNAL ENTRY

Dated: June 3, 2009

WHITMORE, Judge.

{¶1} Plaintiff-Appellant, Smith Family Trust ("the Trust"), appeals from its judgment in the Summit County Court of Common Pleas. This Court affirms.

I

{¶2} In January 2004, the Trust purchased nearly 13 acres of land, now known as Woodland Estates, in Hudson, Ohio. This land was purchased for the purpose of being subdivided for the construction of single family homes, namely Woodland Estates Subdivision. The Trust sought approval of its subdivision plat from the Planning Commission of the City of Hudson based on its plans to develop the land. Generally, the plan designated 19 lots as home sites and reserved a portion of the land for oil and gas exploration and potential extraction ("Block A"). The exploration or extraction of gas and oil from Block A would require a gas and oil well ("the well") be drilled and a corresponding tank battery installed.

{¶3} The City of Hudson's ("the City") approval process requires a property owner to file a preliminary plat, a final plat, and a subdivision improvement plan before land can be developed or put to use. The Planning Commission approved the Trust's preliminary subdivision plat in September 2004. Following that approval, the Trust entered into an oil and gas lease with Ohio Valley Energy Systems ("Ohio Valley") to drill an oil and gas well in Block A. Subsequently, the Trust sought to revise the preliminary plat, and to gain approval for its final plat and subdivision improvement plans. On February 14, 2005, the Planning Commission held a public hearing on the plans and approved the revised preliminary plat, final plat, and the subdivision improvement plans, subject to multiple conditions.

{¶4} Additionally, at the time the hearing was held, the location of the proposed well and tank battery were not included on the plat, nor was there any assertion by the Trust relative to which activity would be pursued first: installation of the well and tank battery or development of the residential lots.

{¶5} On May 20, 2005, the approved plat was recorded by the City, which included covenants reserving property rights and royalties with respect to Block A. About that same time, Ohio Valley drilled the well. A tank battery was also installed at some point.

{¶6} On December 8, 2006, the Trust applied to the City's Board of Zoning and Building Appeals ("the BZBA") for variances from the City's Land Development Code ("L.D.C.") 1207.19(c)(10) and (11) which govern the setback requirements that newly constructed structures must have from existing wells or tank batteries. The BZBA held a hearing on the Trust's variance request on February 15, 2007, which was continued to March 15, 2007. At the hearings, the BZBA heard testimony regarding the variance requests from several witnesses on behalf of both the Trust and the City, including Robert Smith, Trustee for the Trust;

Tom King, the City's Director of Community Development; Robert Carter, the City's Fire Chief; and a resident whose property adjoins the Woodland Estates development.

{¶7} In a written opinion issued on April 19, 2007, the BZBA denied the Trust's requested variances. The Trust then timely filed an administrative appeal pursuant to R.C. 2506.01, challenging the BZBA's denial of its variance application. The Trust asserts six assignments, some of which have been rearranged and consolidated for ease of review.

Assignment of Error Number Two

> "THE TRIAL COURT ERRED AS A MATTER OF LAW IN DETERMINING THAT LAND DEVELOPMENT CODE §1207.19(C)(10) & (11) IS NOT IN CONFLICT WITH THE GENERAL LAWS OF THE STATE."

Assignment of Error Number Three

> "THE TRIAL COURT ERRED AS A MATTER OF LAW IN DETERMINING L.D.C. §1207.19(C)(10) IS NOT VOID FOR VAGUENESS."

{¶8} In its second assignment of error, the Trust argues that the L.D.C. 1207.19 (c)(10) and (11) are preempted by state law pursuant to the enactment of H.B. 278, which amended R.C. 1509 et seq. The Trust further alleges that the City's statutory scheme for regulating oil and gas wells has been fundamentally disrupted by H.B. 278, so much so that the City cannot enforce any of its oil and gas provisions in a constitutional manner, nor can it sever certain unconstitutional portions of the L.D.C. for continued enforcement. In the Trust's third assignment of error, it argues that the City's L.D.C. 1207.19(c)(10) is unconstitutionally vague because it does not define the term "unplugged" when referring to oil and gas well heads. We disagree.

{¶9} Section 3, Article XVIII of the Ohio Constitution provides that "[m]unicipalities shall have authority to exercise all powers of local self-government and to adopt and enforce

within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

{¶10} "The test to determine when a conflict exists between a municipal ordinance and a general law of the state is 'whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa.'" *Independence Excavating, Inc., v. Twinsburg*, 9th Dist. No. 20942, 2002-Ohio- 4526, at ¶9, quoting *Struthers v. Sokol* (1923), 108 Ohio St. 263, paragraph two of the syllabus. General laws are those "which prescribe a rule of conduct upon citizens generally, and which operate with general uniform application throughout the state under the same circumstances and conditions." *Garcia v. Siffrin Residential Assn.* (1980), 63 Ohio St.2d 259, 271, overruled on other grounds, *Saunders v. Clark County Zoning Dept*. (1981), 66 Ohio St.2d 259. In the event of a direct conflict, the state regulation prevails. Id. Whether there is a conflict between a city's ordinance and the state's general law presents a question of law, which this Court reviews de novo. *Ohio Bell Tel. Co. v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 145, 147.

{¶11} R.C. 1509 et seq., regulates the conservation of natural resources and is unquestionably a general law. Thus, we must next consider whether R.C. 1509.02 and the City's L.D.C. are in conflict. In September 2004, R.C. 1509.02, was amended to read, in pertinent part, as follows:

> "There is hereby created in the department of natural resources the division of mineral resources management, which shall be administered by the chief of the division of mineral resources management. *The division has sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells within the state. The regulation of oil and gas activities is a matter of general statewide interest that requires uniform statewide regulation, and this chapter and rules adopted under it constitute a comprehensive plan with respect to all aspects of the locating, drilling, and operating of oil and gas wells within this state, including site restoration and disposal of wastes from those wells.*" (Emphasis added.)

O.A.C. 1501:9-1-05 provides related regulations governing oil and gas drilling and which requires that:

> "*No well shall be drilled nearer than one hundred feet to any inhabited private dwelling house*; nearer than one hundred feet from any public building which may be used as a place of resort, assembly, education, entertainment, lodging, trade, manufacture, repair, storage, traffic, or occupancy by the public; nearer than fifty feet to the traveled part of any public street, road, or highway; nearer than fifty feet to a railroad track; nor nearer than one hundred feet to any other well." (Emphasis added.)

Further, O.A.C. 1501:9-9-05 governs placement of tank batteries and requires that:

> "(A)(2) Oil production tanks shall be set a minimum of fifty feet from the traveled portion of a public road and a minimum of one hundred feet from existing inhabited structures and a minimum of three feet between tanks and a minimum of fifty feet from any well.
>
> "***
>
> "(E)(4)(h) The tank battery, separator and associated equipment may not be placed closer than seventy-five feet from any property not part of the drilling unit unless the property owner and resident of the property grants approval in writing of any proposed location closer than seventy-five feet, or the chief waives the seventy-five foot set-back requirements." (Emphasis added.)

Thus, by their plain language, the state codes regulate the distance that a *new well or new tank battery* can be located in relation to *an existing inhabited structure*. There are no corresponding state provisions that regulate the distance a *new residence or inhabited structure* can be built in relation to an *existing well or tank battery*.

{¶12} The City's L.D.C. reads, in pertinent part, as follows:

> "(10) *No structure suitable for occupancy shall be erected within one hundred (100) feet of any unplugged oil and gas well head.* If the well has been abandoned and plugged, no habitable structure shall be erected within twenty-five (25) feet of the plugged well head.
>
> "(11) Tank batteries shall not be located or relocated closer than two hundred (200) feet to a structure suitable for occupancy, nor can any such structure be erected within this distance. Tank batteries shall not be located or relocated closer than three hundred (300) feet from a property line of any parcel not in the original drilling unit(s)." (Emphasis added.) L.D.C. Code 1207.19(c)

Thus, by its plain language, the L.D.C seeks to regulate the distance that *new homes* are constructed in relation to *existing wells or tank batteries*. Accordingly, the Trust's argument that the City's L.D.C. is preempted by state law is without merit. See, also, *Glenmoore Builders, Inc., v. Smith Family Trust, et al.*, (Sept. 13, 2006) CV 2006 02 1001 (concluding that the City can enforce the setback restrictions set forth in L.D.C. 1207.19(c)(10) and (11) because the provisions are not preempted by R.C. 1509.02).

{¶13} To the extent that the Trust challenges the severability and thus, the enforceability of L.D.C. 1207.19(c)(11), we determine that this issue is not ripe for our review, as the City is not seeking to enforce the provision of the L.D.C. that imposes setback requirements for a new tank battery from an existing inhabitable structure. See *Osnaburg Twp. Zoning Inspector v. Eslich Environmental, Inc.*, 5th Dist. No. 2008CA00026, 2008-Ohio-6671, at ¶40-58 (concluding that the zoning regulation was not ripe for review because the township had not yet prohibited what the general law of the state permits).

{¶14} Next, we consider the Trust's assertion that the term "unplugged" as used in L.D.C. 1207.19(c)(10) is unconstitutionally vague. A municipal ordinance is void for vagueness only if it is stated "'in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application[.]'" *Cuyahoga Falls v. Morris* (Aug. 19, 1998), 9th Dist. No. 18861, at *3, quoting *Connally v. Gen. Constr. Co.* (1926), 269 U.S. 385, 391.

{¶15} The Trust asserts that, because the City's L.D.C. does not define the term "unplugged," the L.D.C. does not provide a party with notice of the City's intention to enforce this setback provision on a producing well head. The Trust, however, presumes that term "unplugged" somehow relates to whether or not the well head is operating or producing. Our review of the L.D.C. does not lead us to such a conclusion. The provision at issue states:

> "No structure suitable for occupancy shall be erected within one hundred (100) feet of any unplugged oil and gas well head. If the well has been abandoned and plugged, no habitable structure shall be erected within twenty-five (25) feet of the plugged well head." L.D.C. 1207.19(c)(10).

The provision makes no reference to whether an unplugged well head would necessarily have to be an operating or producing well as the Trust asserts. Instead, the provision distinguishes setback requirements on the basis that a well head that is "abandoned and plugged" versus "unplugged," irrespective of whether the well head is a producing one. When read in the context of the statute, we conclude the term "unplugged *** well head" is not unconstitutionally vague. Additionally, we reject the Trust's assertion that the use of the term "unplugged" in the statute failed to provide it with notice that the City would enforce its ordinance on producing or non-producing well heads alike. Given the multitude of references in the record that the Trust would be subject to L.D.C. 1207.19(c)(10) if it installed a well head in Block A (discussed *infra*), we conclude the Trust's argument is without merit.

{¶16} For the foregoing reasons, we overrule the Trust's second and third assignments of error are without merit. Accordingly, they are overruled.

II

<u>Assignment of Error Number One</u>

> "THE TRIAL COURT ERRED AS A MATTER OF LAW IN AFFIRMING THE DECISION OF THE BOARD OF ZONING AND BUILDING APPEALS. THE BZBA DECISION WAS UNCONSTITUTIONAL, AS THE TRUST HAS VESTED PROPERTY RIGHTS IN LOTS 9, 10, 11, 12 AND 13 FOR SINGLE FAMILY RESIDENTIAL USE."

{¶17} In its first assignment of error, the Trust generally asserts that it was authorized by the City's Planning Committee to subdivide its property into 19 lots suitable for single-family homes while reserving Block A for oil and gas exploration, yet cannot do so now because the BZBA denied its variance request for sublots 9 – 13. Accordingly, the Trust alleges that it has a

vested property interest in developing those lots and the BZBA's denial of its variance request precludes it from doing so and is therefore unconstitutional. We disagree.

{¶18} First, the Trust alleges the trial court erred in finding that the Planning Committee's written decision issued on February 14, 2005, provided sufficient notice to the Trust as to what setbacks the City would be enforcing with respect to Block A. The Trust further asserts that the City was required to designate the oil and gas setbacks and identify what "applicable law" it meant to enforce during the plat approval process, but it did not.

{¶19} The record reveals that the Trust was informed by the City on numerous occasions, dating back to a letter the City issued to the Trust in October 2004, well before the revised preliminary plans or final plat were submitted to the Planning Committee. In that letter, the City indicated that the installation of a well and tank battery for oil and gas exploration and drilling would "materially change[] the conditions described in [the Trust's] application" and "would very likely jeopardize the approval granted to date [for] the residential subdivision." Further, there is correspondence from the City to Smith in early February 2005 which similarly states that "the City is still bound to enforce setback requirements for new homes adjacent to existing wells. [The City is] regulating homes with respect to wells, not wells in respect to homes. See [L.D.C.] Section 1207.19(c)(10)." Additionally, in his response letter to the City, pre-dating the Planning Committee's approval, Smith challenged the City's ability to enforce the L.D.C. provisions identified by the City. Thus, Smith was unequivocally aware of what setback requirements the City intended to enforce, though he expressly disagreed with the City's ability to do so.

{¶20} The record evidences the fact that the enforcement of the City's L.D.C. setback provisions was also discussed with representatives from the City and the Trust at the February

2005 Planning Commission meeting. The City's Staff Report, which was distributed to interested parties including Smith prior to that meeting, specifically recommended that the City incorporate an approval conditioned upon the final plat noting that L.D.C. setbacks would apply if a well or tank battery were placed in Block A. In turn, the Planning Commission's Decision dated February 14, 2005, contained the following conditions for approval of the Trust's revised preliminary plat, final plat, and subdivision improvement plans:

> "5. To the extent permitted by applicable law Sublots 10-13 are subject to setback requirements from any oil and gas extraction equipment as set forth in the Land Development Code.
>
> "6. Any final comments by R. Todd Hunt, Assistant City Solicitor, and Charles Hauber, City engineering consultant, must be addressed concerning the final subdivision plat."

Moreover, the information provided by the Trust when it did, in fact, seek variances from the BZBA for the affected lots evidences that it was on notice of the L.D.C. setback requirements. Specifically, in his application for the variances to the BZBA, Smith, on behalf of the Trust, responded "yes" to the question "Did the owner of the property purchase the property with the knowledge of the zoning restrictions?"

{¶21} Thus, the Trust had verbal and written notice of the City's intent to enforce the setbacks governing the construction of new homes in relation to an existing well and tank battery. Any argument to the contrary is without merit. Therefore, the trial court did not err in concluding that the Trust was on notice that the setback requirements would be enforced against it.

{¶22} Second, the Trust asserts that the City was responsible for establishing the setbacks on the lots as part of its approval process. The Trust argues it placed Block A close to residential lots because, as an "open space conservation subdivision" under the L.D.C., it was

required to preserve other open areas which left it with no other feasible location in which to locate the well and tank battery. By reserving the oil and gas rights to Block A throughout the plat approval process, the Trust argues the City had an obligation to establish the requisite setbacks in response. The Trust alleges that it complied with the conditions of the plat approval, incorporated language into the plat as requested by the City, and obtained the approval of Assistant Solicitor Hunt as required by one of the conditions of approval, yet now is precluded from developing its land as requested. The Trust further asserts that once the plat was approved and filed by the City in May 2005, it "no longer had the ability to redesign the location of Block A on the plat."

{¶23} The Trust goes to great lengths documenting the exchange that occurred between legal counsel for the City and the Trust and noting that the City requested no changes to the final plat. The Trust's arguments, however, fail for several reasons.

{¶24} First, the Trust inappropriately assigns the City the burden of placing the requisite setbacks on or amending the plat, when in fact, that responsibility falls upon the applicant. L.D.C. 1203.01(a), (g); L.D.C. 1203.02(b). The Trust also seems to assign the City the responsibility of designing the plat to accommodate its request for 19 buildable sublots and a reservation for well and tank battery placement, instead of assuming its responsibility to inform the City where the location of the well and tank battery would be in relation to the sublots so that the City could then evaluate the plat in light of the L.D.C.'s setback requirements.

{¶25} Second, the Trust presumes the City was aware of where a well and tank battery were going to be located in Block A. It is clear from the record that the City was not aware of the location of either the well or tank battery when it approved the plat, but it did, however, repeatedly warn the Trust that, if a well and tank battery were installed before the homes were

constructed, the L.D.C.'s setbacks would be enforced. It was not until nearly two years later, when the Trust's requested variances for sublots 9 – 13 were denied that the inclusion of any setbacks on the recorded plats was even raised as an issue.

{¶26} Lastly, the Trust portrays the filing of the plat as a permanent bar to it ever amending its plan for developing the land. That claim is incorrect because the Trust may modify or amend its plan for the development of sublots at any time. L.D.C. 1203.01(a), (g). Thus, the Trust's assertions that the City failed to meets its obligations with respect to the preparation, review, and approval of the plats is not well taken.

{¶27} Finally, the Trust alleges that the City has obtained the benefit of open space, easements, storm drainage, and roads (as set out in the recorded plat) while simultaneously and unconstitutionally denying the Trust its reciprocal benefit to build homes on 19 lots and explore for oil and gas in Block A (through the City's enforcement of its setback requirements and denial of variances). The BZBA's subsequent denial of the Trust's variance does not unconstitutionally deprive the Trust of its ability to develop the land, it merely governs the Trust's development of the land within the bounds of the L.D.C. which the City had previously informed the Trust would apply to its plat. It is the Trust's own failure to subdivide and develop the lots in compliance with the requisite setbacks that causes its lots to become useless. Additionally, as noted previously, the Trust is not without alternatives; that is, it can pursue actions to redesign the subdivision, plug the well, or relocate the tank battery. For the foregoing reasons, we conclude that the Trust's first assignment of error is without merit. Accordingly, it is overruled.

Assignment of Error Number Four

> "THE TRIAL COURT ERRED AS A MATTER OF LAW IN DETERMINING HUDSON'S ENFORCEMENT OF L.D.C. §1207.19(C)(10) & (11) WAS UNCONSTITUTIONAL AS APPLIED TO LOTS 9, 10, 11, 12 AND 13. THE REGULATIONS ARE ARBITRARY, UNREASONABLE, AND WITHOUT

> SUBSTANTIAL RELATION TO THE PUBLIC HEALTH, SAFETY, MORALS, OR GENERAL WELFARE OF THE COMMUNITY."

{¶28} Though captioned as a challenge to the reasonableness of the City's L.D.C. provisions, in its fourth assignment of error, the Trust instead challenges the enforcement of the provisions. The Trust argues that, by enforcing only a portion of the provisions contained in L.D.C. 1207.19(c)(10) and (11), the Planning Committee has re-written the L.D.C. and has "impermissibly legislated." Specifically, the Trust argues that the City's administrators have essentially "re-writ[ten] pre-empted code sections [] to enforce setbacks which [the City administrators] feel should be enforced, when the general law of the state permits that which they seek to prohibit."

{¶29} Having determined supra that the Revised Code does not preempt the City's ability to regulate the distance that new homes are constructed in relation to an existing well or tank battery, the Trust's argument is not well taken. The City has not rewritten any section of the L.D.C.; rather, it has enforced the provisions challenged by the Trust's decision to install a well and tank battery in disregard to the setbacks required for constructing homes on the adjacent sublots. Therefore, the Trust's arguments are without merit. Accordingly, its fourth assignment of error is overruled.

Assignment of Error Number Five

> "THE TRIAL COURT ABUSED ITS DISCRETION IN AFFIRMING THE DECISION OF THE BZBA AS THE PREPONDERANCE OF SUBSTANTIAL, RELIABLE, AND PROBATIVE EVIDENCE DEMONSTRATES THAT THE BZBA ERRED IN DENYING APPELLANT'S REQUESTED VARIANCES."

{¶30} In the Trust's fifth assignment of error, it argues that the trial court erred in affirming the BZBA's decision because that decision was not supported by substantial, reliable, and probative evidence. The Trust proffered the following evidence in support of its claim: (1) a

report and testimony from the City's Fire Chief, Robert Carter, that a 100 foot setback was sufficient distance for the safe construction of homes; (2) the testimony from Director of Community Development King, that the City's staff "believed a 100 [foot] setback *** was appropriate" based on the Fire Chief's safety report; (3) assertions that the City's regulations which governed "unplugged" wells were inappropriately applied to it because its well had never been "plugged"; and (4) averments that the BZBA inappropriately delegated its duties as the zoning board because its decision was based on factual findings that were drafted by Assistant City Solicitor Hunt.

{¶31} Appellate review of the trial court decision under R.C. 2506.04 "is more limited in scope and requires the 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." *Smith v. Granville Twp. Bd. of Trustees* (1998), 81 Ohio St.3d 608, 613, quoting *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34. An appellate court's review, however, does "not include the same extensive power to weigh the preponderance of substantial, reliable and probative evidence, as is granted to the common pleas court. *** Appellate courts must not substitute their judgment for those of an administrative agency or a trial court absent the approved criteria for doing so." (Internal quotations omitted.) *Henley v. Youngstown Bd. of Zoning Appeals* (2000), 90 Ohio St.3d 142, 147, quoting *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 261. Accordingly, an appellate court's review examines whether the trial court abused its discretion. *Baire v. Bd. of Ed. of the William R. Burton Voc. Ctr. Schools* (Apr. 12, 2000), 9th Dist. No. 99CA007293, at *3, citing *Qualls v. Civ. Serv. Commn.* (June 18, 1997), 9th Dist. No. 17977, at *2. An abuse of discretion is more than an error of judgment, but instead demonstrates

"perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶32} In December 2006, the Trust applied to the BZBA for several variance requests. Based on the L.D.C.'s 100 foot setback requirement imposed upon the new construction of a residence in relation to an existing gas or oil well, the Trust requested the following variances: a 25 foot variance for sublot 9, resulting in the residence having a 75 foot setback from the well; a 75 foot variance for sublot 10, resulting in the residence having a 25 foot setback from the well; a 15 foot variance for sublot 12, resulting in the residence having a 85 foot setback from the well; and a 13 foot variance for sublot 13, resulting in the residence having an 87 foot setback from the well. The variance requests from the 200 foot setback requirement imposed upon the new construction of a residence in relation to an existing tank battery were as follows: a 100 foot variance for sublots 9, 11, 12, and 13, resulting in the residences having a 100 foot setback from the tank battery; and a 125 foot variance for sublot 10, resulting in the residence having a 75 foot setback from the tank battery. The BZBA denied all of the Trust's requested variances. The Trust asserts that the testimony of Fire Chief Carter and Director of Community Development King supported approval of the requested variances; therefore the BZBA erred in denying its request.

{¶33} As to these claims, the record reveals that Fire Chief Carter admitted that he had "general training" in safety measures with respect to oil and gas wells and that, based on his research and discussions with other professionals, "the vast majority of damage occurs within 100 feet of a well head or a tank battery[.]" The damage is generally related to spraying debris from an explosion and radiant heat from the fire. His report indicated that "[w]hile greater

setback offers [an] additional measure of safety, a 100 foot setback is *** sufficient *from a safety point of view*." (Emphasis added.)

{¶34} On appeal, however, the City proffered the testimony of Gates Mills Fire Chief, Phillip Robinson. He testified that, in addition to any explosions or fire, well heads and tank batteries often leak flammable, and sometimes poisonous, gas, which contribute to the rationale for requiring substantial setbacks from residential structures. He testified that in responding to such leaks, his response teams start with an initial isolation area of approximately 330 feet from the leaking well or tank battery. Fire Chief Robinson concluded that the tank battery is potentially more dangerous than the well head because it is pressured, and if it explodes, there is a higher likelihood of debris spraying from the explosion. Fire Chief Robinson testified that a setback of less than 100 feet from a residential structure would be unsafe for either a well or a tank battery.

{¶35} The City also had a city planning and zoning consultant, Mark Majewski, testify to the propriety of the L.D.C.'s setback requirements. He stated that the City's zoning setbacks were consistent with a city's ability to regulate the location of new homes in relation to any wells or tank battery already in existence and that the City's L.D.C. was not in conflict with any state regulation. Additionally, he stated that a city typically regulates not only the safety of a proposed property use, such as drilling, but also the safety of that use in relation to other property uses, such as the construction of new homes next to drilling equipment. Further, he testified that the 100 foot setback for wells and the 200 foot setback for tank batteries was a "reasonable exercise of zoning authority" and that many places, including "gas-friendly *** Texas" impose larger setback requirements, ranging from 300 to 600 feet.

{¶36} It is evident from the record that both sides agree a minimum setback of a 100 feet, particularly in the case of tank batteries, would be appropriate for the construction of a new home in relation to the well or tank battery. Of the nine variances the Trust requested, however, five variances would have been inside the agreed upon safe setback of 100 feet. The remaining four variance requests would have put the homes exactly at that 100 foot point, which, even according to Fire Chief Carter's testimony, is at the nearest point he would consider safe. The supplemental testimony presented to the trial court further supports the BZBA's decision to deny the Trust's variances as there are other risks associated with wells and tank batteries, such as combustible or poisonous leaks, which would support a setback greater than 100 feet from the construction of a home.

{¶37} We note, however, that the L.D.C. requires the BZBA to consider more than just the safety issues associated with a proposed variance. See L.D.C. 1204.03 (setting forth seven different criteria to determine if a property owner would encounter a "practical difficulty" if the zoning ordinance were strictly enforced). Based on the foregoing expert testimony, it appears that there was substantial, reliable, and probative evidence presented to the trial court to support its decision to uphold the BZBA's determination denying the variance.

{¶38} Next, the Trust alleges that Director of Community Development King, supported the City enforcing only a 100 foot setback for tank batteries under L.D.C. 1207.19(c)(11). Our review of the transcript, however, leads us to conclude otherwise. When read in context, King confirmed that the 100 foot setback for homes from tank batteries was "the current [L.D.C.], and we've received no argument to change that." When questioned why the report to the BZBA reflected that the City's staff was willing to discuss a reduction to the tank battery setback, King responded "[i]t's based on extensive review by the Fire Chief looking at just health and safety

issues, ignoring aesthetics and general welfare issues." When viewed in context, we conclude that the Trust is misconstruing King's recommendations with respect to the tank battery setback, as when viewed in the context of his entire testimony, he did not advocate for changing the setback required by the L.D.C. In fact, King made the initial motion to the BZBA to deny the Trust's variance request. Accordingly, the Trust's argument is without merit.

{¶39} The Trust's third challenge to the BZBA's decision asserts that, because its well has never been plugged, it cannot be governed by the L.D.C.'s provision regulating "unplugged" wells. Having previously concluded that this provision is constitutional and was appropriately applied to the Trust, we need not address this argument again.

{¶40} Finally, the Trust alleges that the BZBA delegated its duties in contravention to the L.D.C. when it permitted Assistant City Solicitor Hunt to prepare the findings of fact which the BZBA used to support its decision to deny the requested variances. Additionally, the Trust challenges the findings of fact issued by the BZBA.

{¶41} L.D.C. 1202.03(b)(8)(B) provides that "[a]ll decisions of the BZBA shall be based on written findings of fact related to the relevant standards *** [in the L.D.C.]." No where in the L.D.C. is there a provision precluding another city employee from drafting the findings for review and comment by the BZBA. Furthermore, the record reflects that the BZBA did, in fact, consider the proposed findings of fact and acted as a board when voting to adopt the proposed findings at its next meeting. Thus, there is no evidence to support the Trust's claim otherwise.

{¶42} The factual findings issued by the BZBA were based on the determinations it must make under L.D.C. 1204.03 in order to approve or deny a variance request. L.D.C. 1204.03 requires, in relevant part, that:

> "Variances *** shall not be granted by the BZBA unless the application for variance demonstrates the following:

> “(a) Exceptional or unusual conditions exist that are not common to other areas similarly situated and practical difficulty may result from strict compliance with any of the zoning standards, provided that such relief will not have the effect of nullifying or impairing the intent and purpose of these standards. In determining ‘practical difficulty,’ the BZBA shall consider the following factors:
>
> “(1) Whether the property in question will yield a reasonable return or whether there can be any beneficial use of the property without the variance;
>
> “(2) Whether the variance is substantial;
>
> “(3) Whether the essential character of the neighborhood would be substantially altered or whether adjoining properties would suffer a substantial detriment as a result of the variance;
>
> “(4) Whether the variance would adversely affect the delivery of governmental services such as water and sewer;
>
> “(5) Whether the applicant purchased the property with knowledge of the requirement;
>
> “(6) Whether the applicant’s predicament can be obviated feasibly through some method other than a variance; and
>
> “(7) Whether the spirit and intent behind the requirement would be observed and substantial justice done by granting the variance.”

The Trust asserts that the BZBA erred when it denied its variance request because the Trust had produced evidence of a “practical difficulty” under the statute. The Trust asserts its evidence demonstrated that: (1) sublots 9 – 13 will have no economic value if not buildable and will otherwise only generate a nominal royalty from the gas and oil extraction; (2) the City has approved similarly sized variances; (3) the Trust owns the lots surrounding those for which the variance is requested; (4) the Fire Chief testified that the variances would not adversely affect the ability to provide fire and emergency services; and (5) the Trust was not informed by the City what the applicable law was governing the property.

{¶43} We note that a zoning board need not make findings as to every factor it considers, nor is any one factor controlling or dispositive. *Carrolls Corp. v. Willoughby Bd. of*

Zoning Appeals, 11th Dist. No. 2005-L-110, 2006-Ohio-3411, at ¶20. Instead, the board must weigh the relevant factors to determine whether a practical difficulty exists. Id.

{¶44} The Trust argues that it will suffer a "practical difficulty" under the L.D.C. because, without the ability to build on sublots 9 – 13, its property will no longer yield a reasonable return and cannot be put to beneficial use. As previously addressed, the Trust was aware of the City's intent to enforce the well and tank battery setbacks should it decide to install those devices before constructing the homes on the affected sublots. Thus, it cannot now claim that it faces a "practical difficulty" when the events leading to its situation were self-imposed. The Trust proffered an affidavit from Smith attesting to per-lot royalties of $207 from the oil and gas lease in 2006, asserting that those royalties were insufficient to pay the nearly $5,000 mortgage interest it owes on those sublots. The Trust, however, ignores the overall benefit it has enjoyed from the 14 other buildable sublots and the potential that remains for it to redesign the sublots or relocate the tank battery in order to maximize the property's economic value.

{¶45} The Trust's next two arguments consist of unsupported one sentence assertions that are contradicted by other evidence in the record. There is no credible evidence in the record that the City has approved variances of this magnitude under the current L.D.C. There is, however, evidence that the requested variances are substantial and seek, in four of the five the affected lots, to reduce the setbacks for tank batteries by 50 percent. Additionally, the assertion that the Trust owns the lots around those for which the variance is requested is non-responsive to L.D.C. 1204.03's considerations of "character of the neighborhood" and "whether adjoining properties would suffer a substantial detriment as a result of the variance." Furthermore, given the Trust's intent to sell those lots for construction of single family homes, it will not remain the

owner of the adjoining lots in the future. Nor does its statement consider the impact the variance would have on existing neighborhoods adjacent to the Trust's property.

{¶46} The Trust also alleges that, based on the testimony of Fire Chief Carter, the "delivery of governmental services" would not be affected by granting the variances, as he testified that a 100 foot setback from the tank battery was reasonable and would not adversely impact the delivery of fire or emergency services if either an access or maintenance road was available. The BZBA's finding of fact support this conclusion generally; however, this factor alone is not dispositive of the matter. See *Carrolls Corp.* at ¶20.

{¶47} Finally, the Trust again attempts to allege it was unaware of the applicable law when it purchased and sought to develop the property. We have previously concluded this argument is without merit. We also note that the Trust failed to proffer any arguments in opposition to the final two considerations under the L.D.C. which also formed the basis of the BZBA's decision. See L.D.C. 1204.03 (including in the considerations to determine practical difficulty "whether the applicant's predicament [could] be obviated feasibly through some method other than a variance" and "[w]hether the spirit and intent behind the requirement would be observed and substantial justice done by granting the variance").

{¶48} Our review of the record as to whether a "practical difficulty" exists supports the BZBA's decision to deny the variance requests. In doing so, the BZBA issued its decision, accompanied by eight pages of factual findings outlining the rationale for its decision in light of the criteria set forth in the L.D.C. These findings were supported by evidence in the record and demonstrate that the BZBA appropriately weighed the relevant factors and concluded the variance did not constitute a practical necessity. See *Carrolls Corp.* at ¶20. Thus, we cannot conclude that the trial court abused its discretion in affirming the BZBA's decision to deny the

Trust's requested variances for sublots 9 – 13. Accordingly, the Trust's fifth assignment of error is overruled.

Assignment of Error Number Six

"THE TRIAL COURT ABUSED ITS DISCRETION IN AFFIRMING THE DECISION OF THE BZBA, AS THE DECISION WAS ARBITRARY, CAPRICIOUS, AND UNREASONABLE."

{¶49} In its sixth assignment of error, the Trust claims that the City granted a similar variance in 2005 and that its present denial must therefore be arbitrary, capricious and unreasonable. This argument, however, is undeveloped and not supported by any evidence in the record. The Trust also points to an unsigned draft settlement agreement from 1993, purportedly entered into by the Township of Hudson pursuant to a Hudson Zoning Resolution. Because the case before us involves a matter between the City and is governed by the L.D.C., we consider the 1993 agreement, even if authenticated, inapplicable to the case at bar. Thus, the Trust has not directed this Court to any credible evidence in the record in support of its claim. See App.R. 16(A)(7). Furthermore, the Trust's reliance on *Kisil v. City of Sandusky* (1984), 12 Ohio St.3d 30, 33, is misplaced, in that it has failed to demonstrate to this Court how the City has acted in an arbitrary and unreasonable manner. Accordingly, the Trust's sixth assignment of error is overruled.

III

{¶50} The Trust's six assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

CARR, P. J.
BELFANCE, J.
CONCUR

APPEARANCES:

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