

BEFORE THE CITY COUNCIL OF THE CITY OF BEXLEY, OHIO

Fehd Massen, *et al.*,

Appellants,

v.

City of Bexley Board of Zoning and
Planning,

Appellee.

APPEAL # 21-2

BZAP CASE NO. 20 – 48
Decision Rendered February 25, 2021
Minutes Approved March 25, 2021

APPELLANTS' MERIT BRIEF

Now come the appellants herein, Fehd Massen, Anna Massen, Susan Plaisted, Dustin Snow, Tiffany Canfield, and Leah Turner (“Appellants”), by and through counsel, and submit the following as their Appellants’ Brief in support of their appeal.

I. INTRODUCTION

Appellants bring this appeal pursuant to Section 1226.19 of the City Code¹ to challenge the decision of the Bexley Board of Zoning and Planning (“BZAP”) rendered on February 25, 2021, that granted the application of The Community Builders (“TCB”) for conditional uses that would allow dwelling units on the first and upper floors of a building in a commercially-zoned district (“the Decision”). Appellants are all Bexley property owners that are directly and adversely affected by the Decision. The Property that is the Subject of the Decision is owned by Sally A. Woodyard, and it is currently used as a funeral home, although a single-family residence is located on the Property as well. Additionally, the Property is zoned as a Commercial Service District in the City of Bexley (“the City”).

¹ The term “City Code” shall mean the Codified Ordinances of the City of Bexley, Ohio.

As set forth herein, and as Appellants will further demonstrate at the oral argument currently scheduled for December 15, 2021, BZAP's decision was made in error because it is not supported by the record and is unreasonable and unlawful. Accordingly, City Council for the City of Bexley ("City Council") should reverse BZAP's decision, or at a minimum vacate the decision and remand this matter back to BZAP for further proceedings.

II. BACKGROUND

On or about January 26, 2021, TCB filed an application with the City seeking, among other things, approval for conditional uses to allow dwelling units on the first floor and dwelling units above the first floor of a proposed 3-story, 34,687 square-foot residential building that would be constructed on the Property ("the Development"). (TCB Cond. Use App.). The Development would result in the construction of a high-density multi-family use on the Property with a building consisting of twenty seven (27) apartment units (a combination of three (3) one-bedroom units; seventeen (17) two-bedroom units; and seven (7) three-bedroom units, for a total of fifty-eight (58) bedrooms), and only thirty (30) parking spaces, all on less than an acre of land. *Id.* There would be no commercial use of the Property. *Id.*

TCB's application initially went before the Bexley Architectural Review Board ("the ARB") on January 14, 2021, for architectural review and to obtain a recommendation for BZAP. (Pub. Not. of Bexley ARB and BZAP). After its review, the ARB recommended that BZAP issue a Certificate of Appropriateness on the condition that TCB return to the ARB for a Certificate of Appropriateness and that the application be reviewed by the Bexley Tree and Gardens Commission. (Det. and Rec. of Action of ARB). The ARB made no findings and offered no opinion regarding the conditional use aspects of TCB's application. *Id.* Accordingly, TCB's application was scheduled to be heard by BZAP on January 28, 2021.

On January 28, 2021, BZAP conducted a virtual hearing on TCB's application for the conditional uses. (Vid. of Jan. 28, 2021 BZAP Meeting²; Mins. of BZAP Jan. 28, 2021 Meeting). Aside from the members of BZAP, City staff and consultants, and TCB's representatives, fifteen residents from the area near the Property appeared and provided testimony. *Id.* In general, all of the neighboring residents had concerns with the Development as it had been proposed, ***and no neighboring residents showed up to voice support for the Development.*** *Id.* The neighbors' concerns focused on traffic, parking, safety, scale and density, property values and privacy, much of which arose from the fact that the incredibly dense multifamily Development would be constructed immediately adjacent to a lower-density, single-family residential neighborhood already burdened by scarce on-street parking and comprised mainly of single-story homes. Further, concerns were raised about the location of the Development being along Livingston Avenue, a major thoroughfare on the edge of the City where accidents commonly occur, in light of the likelihood of several children occupying the property. *Id.* Many of the neighbors who testified at the hearing also raised issues related to receiving inadequate notice of hearings and the inability to access the City's current code of ordinances. *Id.* Ultimately, after many hours of testimony, BZAP tabled the application until the next meeting. *Id.*

On February 25, 2021, BZAP conducted a second virtual hearing on TCB's application for the conditional uses. At this hearing, Jason Sudy provided statements to BZAP on the application which, in essence and among other things, advocated that the Development met the conditional use criteria contained in the City Code and that it would conform to the applicable

² Video of the January 28, 2021 BZAP meeting is available at <https://www.youtube.com/watch?v=-Zvn1Liks0c>

development standards.³ (Vid. of Feb. 25, 2021 BZAP Meeting⁴; Mins. of BZAP Feb. 25, 2021 Meeting). Representatives of TCB also appeared – with legal counsel this time – and just as in the January 28th hearing, many neighboring residents appeared (upwards of 15 individuals again, many of whom also attended the prior meeting) who voiced their concerns which, in large part, mirrored the issues they had previously raised about the Development. *Just as in the prior meeting, too, no neighboring property owners appeared and testified in support of the Development.*

Notwithstanding TCB's failure to adequately show by a preponderance of substantial, reliable and probative evidence that all of the criteria necessary for a conditional use to be approved were met, and notwithstanding the numerous, overwhelmingly negative and consistent concerns and opposition voiced by the many neighboring property owners, BZAP granted TCB's requests for the conditional uses.

As set forth herein, BZAP erred in approving the conditional uses because, among other things: i.) one or more of the criteria necessary to be granted a conditional use were not met; ii.) granting the conditional uses effectively resulted in a de-facto rezoning of the Property in contradiction to the terms of the City Code; and iii.) the decision to allow only thirty (30) parking spaces – indeed, a significant component of the Development identified by the neighbors, and certain members of BZAP, as a serious concern – was arbitrary and unreasonable. For these reasons, the Decision must be reversed or vacated.

³It appears that Mr. Study was never sworn in prior to providing his testimony at either hearing before BZAP, and thus his statements should not be considered evidence in any sense, let alone substantial, reliable or probative evidence properly presented before BZAP to be considered in its decision.

⁴ Video of the February 25, 2021 BZAP meeting is available at <https://www.youtube.com/watch?v=deSA0brKVu8>

III. LAW AND ARGUMENT

A. *BZAP erred in granting TCB's application for conditional use permits because TCB failed to establish several of the elements required to be granted a conditional use.*

Conditional uses are uses that are allowed in a zoning code, but due to their nature they may have a significant impact and thus require an administrative hearing for approval. Stuart Meck et al., *Ohio Planning and Zoning Law* § 9:11 (2018 Edition). In issuing a conditional zoning certificate, a board is governed by whatever terms and conditions are imposed by the controlling ordinance. *Id.* at § 9:12.

Pertinent here, the granting of conditional uses in the City is governed by Section 1226.12 of the City Code, which provides, in pertinent part, as follows:

The Board of Zoning and Planning shall have the power to approve applications for Conditional Uses specified in Chapters 1252 and 1254. The proposed use shall be approved *if, and only if*, it meets the intent of this Zoning Code *and the intent of the zoning district in which the property is located, fits harmoniously with adjacent uses and structures and complies with all other provisions of this Zoning Code.* The Board of Zoning and Planning has no obligation to approve a Conditional Use. This Zoning Code assumes that conditionally permitted uses are not appropriate unless an applicant proves that the use will not be detrimental to the public health, safety, or general welfare of the City or the neighborhood in which it is proposed. Such uses shall only be approved if *the applicant* proves *all* the following factors are met:

- (a) The use is consistent with the goals and policies of any adopted plans of the City of Bexley, including, but not limited to, the Main Street Guidelines.
- (b) The use will not have a negative impact on the neighboring land uses and the larger community because of the differences between the proposed use and existing uses in the community.
- (c) The use will not be hazardous to or have a negative impact on existing or future surrounding uses.
- (d) The property and any proposed modifications meet or satisfy the lot/yard or height requirements in the code and other general code provisions including landscape requirements, parking standards, and storm drainage requirements as existing or as may be adopted, except that BZAP may grant minor area variances necessary for the proposed conditional use.

- (e) The use does not create an undue burden on existing public facilities and services such as street, utilities, schools or refuse disposal.
- (f) The use is consistent with and/or furthers the City's economic goals and will not decrease property values or have a negative economic impact.
- (g) The use is in character and keeping and compatible with the adjacent structures and uses.
- (h) Any proposed construction will not result in the destruction, loss, or damage of a natural, scenic, or historic feature of major importance.

(emphasis added).

Section 1226.12 of the City Code makes several things clear. First, there are numerous factors and considerations, including factors and considerations other than those delineated in subsections a through h of the section, which must be met in order for a conditional use to be granted. Second, *all* of the factors and considerations must be met. Third, it is the applicant's obligation to establish that all of the factors are met. In this case, several of the considerations and criteria contained in Section 1226.12 of the City Code were not proven by the applicant, TCB. Thus, BZAP's decision to grant its conditional use requests was error.

As identified above, Section 1226.12 of the City Code mandates that a "proposed [conditional] use shall be approved if, and only if, it meets the intent of [the] Zoning code and the intent of the zoning district in which the property is located, fits harmoniously with adjacent uses and structures and complies with all of other provisions of [the] Zoning Code." The Development does not pass muster here in this regard.

The Property is zoned as a Commercial Service District, which is defined in the Commercial and Institutional District Regulations (i.e. Chapter 1254) of the City Code. Section 1254.01 of the City Code states that "the specific intent of each Commercial, Institutional and Mixed-Use zoning district shall be as follows in this chapter," and Section 1254.05 of the City

Code [Commercial Service District (CS)] specifically describes the district as “an area of the City that is presently developed for primarily quick-stop commercial service use... Its use should be protected from conflicting activities and incompatible scales.”

Despite being located in a Commercial Service District, the Development’s use – as permitted by the conditional uses granted by BZAP – will effectively convert the property solely into a residential use district for high-density multifamily housing; indeed, the Development will contain no commercial activity whatsoever. Accordingly, it is impossible to find, and there is no evidence that TCB proved or that BZAP did indeed find, that the conditional uses sought by TCB would result in a use that meets the “intent” of the *commercial district* in which the Property is located.

This is not to say that dwelling units on the first and/or upper floors of a building in a Commercial Services District as conditionally permitted by Section 1254.09 of the City Code would always violate the intent of the district. But, how can it possibly be that the Development (an approximately 35,000 square foot multifamily housing project consisting only of one, two and three bedroom apartments on less than an acre of land and containing no commercial use) “meets the intent” of a commercially zoned district intended primarily for quick-stop commercial use? The answer is that it doesn’t, and thus the conditional uses should not have been granted in this case.

Aside from that fundamental issue, several other criteria required for the issuance of a conditional use were not established by TCB.

First, TCB failed to show that the use would be consistent with the goals and policies of any adopted plans of the City, including, but not limited to, the Main Street Guidelines. Rather than looking to any plan specifically pertaining to the development and use of land in the City

along Livingston Avenue, TCB turned to certain goals and statements in city initiatives that are applicable in a general sense to operations in the City as a whole (i.e. parts of the City of Bexley Diversity Equity & Inclusion Strategy and the City of Bexley Strategic Plan). (TCB's Hearing Exs.). Meanwhile, the Southwest Bexley Master Plan (Southwest Bexley Strategic Framework), the plan which most directly and appropriately applies to development and land use along Livingston Avenue and at the Property, was completely ignored. (Opponents' Hearing Exs.).

Second, TCB failed to show that the use will not have a negative impact on neighboring land uses and the larger community because of differences between the proposed use and existing uses in the community. During the hearing, TCB, rather than showing that the Development would not negatively impact neighboring land uses and the larger community, engaged in misdirection by merely alleged that the Development would act as a transition point between commercial and residential uses and opined, without any expert testimony, that the Development would be a less intensive use compared to other permitted uses in the Commercial Services District. (Party Meeting Exs.; 57:31 – 59:14 of Feb. 25th Hearing Video). But these contentions do not address the subjects of this second factor and fail to show that the Development will not have a negative impact on neighboring land uses. Conversely, substantial evidence was presented to BZAP that the project would likely have a negative impact on neighboring land uses.

Third, TCB failed to show that the use will not be hazardous or have a negative impact on existing or future land uses. Just as with the previous factor, TCB attempted to skirt the issue by stating that the use was a conditional use, opining that it would be a less intensive use (mainly in regards to parking only), and mentioning that an environmental assessment had been completed. (TCB's Meeting Exs.; 59:21 – 1:06:08 of Feb. 25th Meeting Video]. But these things, again, do

not address this third factor's criteria and fail to show that there will be not be any hazardous nor negative impact on existing or future land uses. Meanwhile, significant evidence was presented that such results would occur. (Mins. of Jan. 28th and Feb. 25th BZAP Meetings).

Fourth, TCB failed to prove that the use is consistent with and/or furthers the City's economic goals and will not decrease property values or have a negative economic impact. Here, TCB failed to provide any reliable evidence by means of any direct or expert testimony that the Development would not decrease property values or have a negative economic impact on the surrounding properties. (TCB's Meeting Exs.; 1:09:59 – 1:12:05 of Feb. 25th Meeting Video). Instead, TCB cited two studies that home values may not be negatively impacted, but in doing so it provided no support or the reliability of those studies and it did not connect or explain how the findings in those studies would translate to like results for this project. *Id.*

Fifth, TCB failed to prove that the proposed use would be in character and keeping and compatible with the adjacent structures and uses. In consistent fashion, TCB danced around the actual elements in this factor and instead focused upon utterly irrelevant red herrings. (TCB's Meeting Exs.; 1:12:06 – 1:13:22 of Feb. 25th Meeting Video). Particularly, whether the Development will be a transition point or will be in conformance with the development standards in the City Code, as discussed by TCB, are irrelevant points as to whether it is compatible with adjacent structures and uses. Furthermore, given that TCB would be required to return to the ARB for further architectural review, how could BZAP determine by a preponderance of the evidence that the Development in its final form would be in character and compatible with adjacent structures? Absent some clairvoyant ability, it is not possible.

As shown here, TCB clearly failed to prove that all of the criteria necessary to be granted a conditional use were met. Therefore, BZAP erred in granting the requested conditional uses, and its decision should be reversed or vacated.

B. Granting the conditional uses effectively rezoned the property in contravention to the Bexley Code and in a manner analogous to unlawful spot zoning.

As stated several times herein, the Property is located in a Commercial Services District, which is intended for quick-stop commercial service use. By granting both conditional uses sought by TCB and allowing the Development to proceed, however, BZAP effectively converted a district designated by law as primarily for commercial use (albeit with dwelling units conditionally permitted), to an entirely residential district consisting solely of high-density multi-family housing and no commercial use. Aside from the fact that this de facto “rezoning” violates the intent of this particular district, it also runs afoul of other parts of the City Code as well.

In particular, the ordinances governing residential districts in the city are found in Chapter 1252 of the City Code, entitled Residential District Regulations. In that chapter, the Bexley Code identifies the various types of residential districts found in the City: a.) low density single-family residential district (R-1) (Section 1252.03); intermediate density single-family residential district (R-2) (Section 1252.04); medium density single-family district (R-3) (Section 1252.05); medium-high density single family residential district (R-6) (Section 1252.06); and low density multifamily residential district (R-12) (Section 1252.07). Interestingly, there is no district in the Bexley Code that explicitly provides for intermediate, medium, or high density multifamily development. Instead, each of the residential districts provides, in essence, that any development or redevelopment of a higher residential density than allowed under the existing development standards should generally only be allowed by planned unit development and in appropriate locations.

Here, rather than requiring TCB to rezone the Property to allow for the intended use through an amendment to the zoning map, the City and BZAP allowed TCB to utilize the conditional use process to circumvent the established intent found in the City Code which requires the Property to be rezoned for the proposed high density multifamily residential use.

Moreover, BZAP's decision to allow only high density multifamily development on the Property is closely analogous to unlawful spot zoning. The Ohio Supreme Court has defined "spot zoning" as "the singling out of a lot or small area for discriminatory or different treatment from that accorded surrounding land which is similar in character." *Willott, et al. v. Village of Beachwood, et al.*, 175 Ohio St. 557, 197 N.E.2d 201 (1964) paragraph two of the syllabus. While BZAP certainly did not rezone the property by amending the City's zoning code or map, its decision did effectively result in allowing a use on the Property that is entirely different from any other Commercial Service District in the City, as well as the area surrounding the Property.

For the foregoing reasons, BZAP's decision should be reversed or vacated.

C. BZAP's decision to only require thirty (30) parking spaces as a part of the Development was arbitrary and in contravention to the applicable law.

One concern raised by numerous neighboring residents, as well as certain members of BZAP, was whether the number of parking spaces proposed for the Development was sufficient. For 27 dwelling units (consisting, again, of one, two and three bedroom apartments), TCB proposed to provide thirty (30) parking spaces, and BZAP ultimately approved that amount of parking.

During both the January 28th and February 25th hearings, Mr. Sudy stated that the City Code does not explicitly state the number of parking spaces for residential use in a Commercial Service District, but it was his opinion that a Mixed Use Commercial district's requirement of one space per dwelling unit (see Section 1262.02 of the Bexley Code) was a fair and reasonable

standard to look to for guidance.⁵ Mr. Sudy's opinion, however, was arbitrary and unreasonable, and alternative standards in the Bexley Code that are clearly more applicable and appropriate under the circumstances were ignored.

Mixed Use Commercial Districts are intended to allow and encourage a strong local shopping and business center in the City, and mixed-use development should be allowed and encouraged in the districts. Section 1254.03 of the City Code. The Mixed Use Commercial District is very specifically meant to promote mixed-use residential, commercial, office and pedestrian-oriented retail development. *Id.* Just as with the Commercial Services District, a commercial use is intended in the Mixed Use Commercial District under the City Code.

However, as already explained herein, the Development contemplates no commercial use on the Property. Thus, looking outside of the Commercial Services District to another commercially-oriented district in the City Code for guidance on parking (or any other standard) is misplaced and makes no sense, especially for this issue given the different parking needs and patterns present for residential and commercial uses. Rather, the more appropriate source would be to look to other residential districts in the City Code which, per Section 1262.02, require that 1.5 to 2 spaces per dwelling unit should be provided (it is noteworthy that the residential areas to the east and north of the Property are predominantly R-6 districts (medium-high intensity single-family residential), which require 2 spaces per dwelling unit).

Alternatively, the Commercial Service District language contained in the City Code explicitly offers even another possibility. It states, in pertinent part, “[w]here occurring at the border of the City, development standards should reflect those of adjacent community development practices where appropriate.” Section 1254.05 of the City Code. In this case, the

⁵ As noted before, Mr. Sudy was not sworn in prior to providing his testimony, and thus any statements or testimony from him carry little, if any, evidentiary weight.

Development is located on the border of the cities of Bexley and Columbus along a busy corridor. For a use of the type proposed in the Development, i.e. 4 or more dwelling units, Columbus would require 1.5 spaces per dwelling unit. Section 3312.49 of the Columbus Code of Ordinances. Given that parking standards for Commercial Service Districts are not explicitly provided in the City Code, it would be most appropriate – especially given the location of the development – to reflect the parking standards found in Columbus for similar developments. The similarity between Columbus’s parking standards for residential uses and those of Bexley even further supports the logic in using the 1.5 spaces per dwelling unit standard.

Thus, there are clearly more appropriate and applicable districts (i.e. residential districts) to look to for guidance on the number of parking spaces that should be required for the Development, an entirely residential project, and each of these would require more parking spaces than the amount proposed by TCB. Therefore, the decision to apply the parking requirements applicable to the Mixed Use Commercial Districts in the City to the Development was arbitrary and unreasonable. Moreover, given that parking was such a large concern of the neighboring residents and several BZAP members, this arbitrary and unreasonable decision undercuts the entire decision to grant the conditional uses. Accordingly, BZAP’s decision should be reversed or vacated.

IV. CONCLUSION

For the foregoing reasons, the Appellants respectfully ask City Council to reverse or vacate the decision of the Bexley Board of Zoning and Planning that granted The Community Builder’s request for conditional uses on the Property.

Additionally, Appellants hereby explicitly reserve the right to raise any additional issues set forth in the Notice of Appeal filed on April 23, 2021, at the oral argument of this appeal in accordance with Section 1226.19 of the City Code.

Respectfully submitted,

By: /s/ Bryan S. Hunt
Bryan S. Hunt (0095519)
Loveland Law, LLC
3300 Riverside Drive - Suite 125
Upper Arlington, Ohio 43221
Telephone: 1-614-928-9107
Facsimile: 1-614-737-9857
E-mail: bshunt@lovelandlaw.net

Attorney for Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was electronically filed with the City of Bexley and served upon the following by electronic mail this 7th day of December, 2021:

Catherine Cunningham, Esq.
Kegler, Brown, Hill + Ritter Co., LPA
65 East State Street
Suite 1800
Columbus, Ohio 43215
*Attorney for the City of Bexley Board of
Zoning and Planning, the City of Bexley
City Council, and the City of Bexley*

Katarina Karac, Esq.
David Hodge, Esq.
Underhill & Hodge, LLC
8000 Walton Parkway #260
New Albany, Ohio 43054
Attorneys for The Community Builders

/s/ Bryan S. Hunt
Bryan S. Hunt (0095519)