COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

S-THREE, LLC,	:	
Plaintiff/Appellant	:	**CASE NO. 2013 CVF 01712**
vs.	:	**Judge McBride**
BATAVIA TOWNSHIP BOARD OF ZONING APPEALS	:	
Defendant/Appellee	:	**DECISION/ENTRY**
	:	

Graydon Head & Ritchey LLP, Harry J. Finke IV, counsel for the plaintiff/appellant S-Three, LLC, 1900 Fifth Third Center, 511 Walnut Street, Cincinnati, Ohio 45202-3157.

Schroeder, Maundrell, Barbiere & Powers, Lawrence E. Barbiere and Christopher L. Moore, counsel for the defendant/appellee Batavia Township Board of Zoning Appeals, 5300 Socialville Foster Road, Suite 200, Mason, Ohio 45040.

This cause is before the court for consideration of an appeal brought by S-Three, LLC from the decision of the Batavia Township Board of Zoning Appeals to grant a use variance to Edward Slattery and Holli Slattery.

The court entered a briefing schedule and directed that oral argument would be heard upon the request of any party. No party requested oral argument on the appeal. When the final memorandum was filed on July 18, 2014, this case was taken under advisement.

Upon consideration of the record of the proceeding, the written arguments of counsel, the evidence presented for the court's consideration, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

Edward Slattery and Holli Slattery initially applied for a conditional use variance that would allow for expanded use of their property as a religious place of worship. Their property is currently zoned within an Agricultural District. The Batavia Township Board of Zoning Appeals met for a public hearing on September 19, 2013 and denied that request.[1]

The application was then re-filed as a use variance for the same purpose.[2] The Batavia Township Board of Zoning Appeals met for a public hearing on October 17, 2013 to consider the request. At that hearing, Edward Slattery testified that he wanted to use his property for several church meetings a week and also to have several church picnics each year.[3] He indicated that normally the events at his home resulted in less than thirty cars coming to his property.[4]

After Mr. Slattery offered his testimony, Dan Reitz spoke to the Board and identified himself as an attorney representing an adjacent property owner, S-Three, LLC.[5] Mr. Reitz argued that the use variance request did not meet the standards

[1] Notice of Filing of Transcript of Proceedings, filed Jan. 8, 2014.
[2] Id.
[3] Id, Transcript of October 17, 2013 meeting at pg. 2.
[4] Id. at pg. 3.
[5] Id. at pg. 4 and 6.

required by the zoning code or Ohio law.[6] Mr. Reitz indicated that "there was noise" and that the proposed varied use of the property was "going to be disruptive of the neighbors" but offered no testimony to this effect.[7] In response to some of these concerns, Mr. Slattery indicated that he had never been contacted by any of his neighbors to complain about excessive noise during any of his church events.[8]

The Board engaged in a lengthy discussion of this issue during the meeting. Board Member Abrams noted that this was an "unusual petition" and that "it doesn't fall squarely within a conditional use permit * * *" and "it doesn't fall squarely within variance."[9] Board Member Abrams later stated that "* * * I also understand your opponents statement that there is some issues (*sic*) with the technical standard of variance, but it you even see any variance granted by any Board of Zoning Appeals, there is never, had anybody ever complied with that in the history of mankind."[10]

Ultimately, the Board voted to approve the use variance for a period of twelve months and to allow no more than three indoor meetings per week with no more than 30 vehicles associated with those meetings and to allow one picnic per year.[11]

S-Three, LLC now appeals from that decision, arguing that the decision does not comply with the zoning ordinance or Ohio law and that the decision was arbitrary, unreasonable, unsupported by evidence and contrary to law.

[6] Id. at pgs. 4-5.
[7] Id. at pg. 5.
[8] Id. at pg. 6.
[9] Id. at pg. 6.
[10] Id. at pg. 12.
[11] Id. at pgs. 19-20.

LEGAL ANALYSIS

(A) STANDING

The appellee argues in its memorandum that the appellant S-Three, LLC does not have standing to bring this appeal.

The Ohio Supreme Court has limited standing to appeal an administrative decision under R.C. 2506.01 to those " 'directly affected' by an administrative decision[;]" and has held that " '[a] person owning property contiguous to the proposed use who has previously indicated an interest in the matter by a prior court action challenging the use, and who attends a hearing on the variance together with counsel, is within that class of persons directly affected by the administrative decision and is entitled to appeal under R.C. Chapter 2506."[12]

The court later stated in *Willoughby Hills v. C.C. Bar's Sahara, Inc.,* 64 Ohio St.3d 24, 591 N.E.2d 1203 (1992) that " '[a]djacent or contiguous property owners who oppose and participate in the administrative proceedings concerning the issuance of a variance' have standing to seek appellate review under R.C. 2506.01."[13] The court went on to clarify the meaning of "directly affected" as follows:

> " 'The private litigant has standing to complain of harm which is unique to himself. In contrast, a private property owner across town, who seeks reversal of the granting of a variance because of its effect on the character of the city as a whole, would lack standing because his injury does not differ from that suffered by the community at large. The latter litigant would, therefore, be unable to demonstrate the

[12] *Lupo v. Columbus,* 10th Dist. Franklin No. 13AP-1063, 2014-Ohio-2792, ¶ 27, quoting *Schomaeker v. First Natl. Bank,* 66 Ohio St.2d 304, 311–12, 421 N.E.2d 530 (1981).
[13] Id. at ¶ 28, quoting *Willoughby Hills* at 26.

> necessary unique prejudice which resulted from the board's approval of the requested variance.' "[14]

In the case at bar, the appellant is an adjacent landowner who sent a legal representative to participate in the administrative hearing concerning the requested variance. Mr. Reitz indicated in his argument to the Board that there was a noise issue related to the meetings held on the Slattery property. With three indoor meetings per week and up to thirty vehicles going to and from the property, it is reasonable to assume that there would be increased noise not normally associated with property zoned agricultural which would have an adverse effect on adjacent landowners. As a result, the court finds that S-Three, LLC has standing to seek the present appellate review.

(B) REVIEW OF THE BOARD'S DECISION TO GRANT THE USE VARIANCE

Pursuant to R.C. 2506.04:

> "If an appeal is taken in relation to a final order, adjudication, or decision covered by division (A) of section 2506.01 of the Revised Code, the court may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from with instructions to enter an order, adjudication, or decision consistent with the findings or opinion of the court. The judgment of the court may be appealed by any party on questions of law as provided in the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code."

[14] Id., quoting, *Willoughby Hills* at 27.

" 'A common pleas court reviewing an administrative appeal pursuant to R.C. 2506.04 weighs the evidence in the whole record and determines whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of the substantial, reliable, and probative evidence.' "[15] "In reviewing an administrative decision, a court is bound by the nature of administrative proceedings to presume that the decision of the administrative agency is reasonable and valid."[16] "Common pleas courts evaluating the decision of an administrative body must weigh the evidence in the record in order to determine whether there is a preponderance of reliable, probative, and substantial evidence supporting the decision, but the reviewing court should not substitute its judgment for that of the agency."[17]

R.C. 519.14(B) states that a township board of zoning appeals may "[a]uthorize, upon appeal, in specific cases, such variance from the terms of the zoning resolution as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the resolution will result in unnecessary hardship, and so that the spirit of the resolution shall be observed and substantial justice done[.]"

R.C. 713.11 empowers the legislative authority of a municipal corporation "to delegate to * * * [an] administrative board the power to administer the details of the zoning regulations, including 'the power * * * to permit exceptions to and variations from the district regulations in the classes of cases or situations specified in the regulations *

[15] *Hutchinson v. Wayne Twp. Bd. of Zoning Appeals* (Sept. 10, 2012), 12th Dist. Butler No. CA2012-02-032, 2012-Ohio-4103, ¶ 14, quoting *Key–Ads, Inc. v. Bd. of Cty. Commrs.* (March 31, 2008), 12th Dist. Warren No. CA2007–06–085, 2008–Ohio–1474, ¶ 7.

[16] *Taylor v. Wayne Twp. Bd. of Trustees* (Jan. 20, 2009), 12th Dist. Butler No. CA2008-02-032, 2009-Ohio-193, ¶ 9, citing *Community Concerned Citizens, Inc. v. Union Twp. Bd. of Zoning Appeals,* 66 Ohio St.3d 452, 456, 613 N.E.2d 580, 1993-Ohio-115.

[17] Id., citing *Community Concerned Citizens*, supra; and *Kisil v. City of Sandusky*, 12 Ohio St.3d 30, 34, 465 N.E.2d 848 (1984).

* *.'"[18] This allows a board to grant a "use variance" which "permits land uses for purposes other than those permitted in the district as prescribed in the relevant regulation."[19]

" '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.'"[20] "Whether extraordinary circumstances exist to justify the issuance of a variance is a question of fact to be determined by the zoning board or commission."[21] "A board of zoning appeals maintains wide latitude in deciding whether to grant or deny a variance."[22]

"In making its determination to grant or deny a variance, the board of zoning appeals must determine whether enforcement of the resolution will cause the property owner an unnecessary hardship."[23] Generally, " '[u]nnecessary hardship' results 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."[24] " * * * [E]vidence must be presented to show that the property is unsuitable to any of the permitted uses as zoned."[25]

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[18] *Schomaeker*, supra, 66 Ohio St.2d at 306, quoting R.C. 713.11(A).
[19] Id.
[20] *Culkar v. Brooklyn Hts.*, 192 Ohio App.3d 383, 2011-Ohio-724, 949 N.E.2d 103, ¶ 26 (8th Dist.), quoting *Schomaeker* at 309.
[21] Id.
[22] Id. at ¶ 35, citing *Schomaeker* at 306.
[23] Id., citing *Set Prods., Inc. v. Bainbridge Twp. Bd. of Zoning Appeals*, 31 Ohio St.3d 260, 263, 510 N.E.2d 373 (1987).
[24] Id., citing *Hulligan v. Bd. of Zoning Appeals*, 59 Ohio App.2d 105, 109, 392 N.E.2d 1272 (9th Dist.1978), quoting *Fox v. Johnson*, 28 Ohio App.2d 175, 181, 275 N.E.2d 637 (7th Dist.1971).
[25] Id., citing *Cole v. Bd. of Zoning Appeals*, 39 Ohio App.2d 177, 183–184, 317 N.E.2d 65 (3rd Dist.1973).

Similarly, the Batavia Township Zoning Ordinance states in relevant part as follows:

> "Use Variance
>
> In order to grant a use variance, the Board shall determine that strict compliance with the terms of this zoning resolution will result in unnecessary hardship to the applicant. The applicant must demonstrate such hardship by clear and convincing evidence that all of the following criteria are satisfied:
>
> a. The property cannot be put to any economically viable use under any of the permitted uses in the zoning district in which the property is located.
>
> b. The variance requested stems from a condition which is unique to the property at issue and not ordinarily found in the same zone or district.
>
> c. The variance requested cannot otherwise be resolved by a zoning map amendment.
>
> d. The hardship condition is not created by actions of the applicant.
>
> e. The granting of the variance will not adversely affect the rights of adjacent property owners or residents.
>
> f. The granting of the variance will not adversely affect the public health, safety or general welfare.
>
> g. The variance will be consistent with the general spirit and intent of the zoning resolution.
>
> h. The variance sought is the minimum that will afford relief to the applicant."[26]

The Board, and specifically Board member Abrams, discussed some of the requirements from the zoning ordinance during the October 17th meeting in response to counsel's argument that the application did not meet any of the required standards. Ms.

[26] Brief of Appellant S-Three, LLC, Exhibit D.

Abrams stated that (1) Mr. Slattery asked for the minimum that would afford his relief, (2) she didn't know "that it is inconsistent, whether it stays consistent with the general spirit of the zoning resolution[,]" (3) she did not believe the issue that the variance adversely affects the public health, safety and general welfare would "be back[,]" (4) granting a variance would not adversely affect the rights of the adjacent property owners, and (5) this issue would not be appropriate for a zoning map amendment.[27] Ms. Abrams further stated "* * * I don't know that the hardship is created by the actions of the applicant if he is here actually because we asked him to file this rather than a conditional use."[28] With regard to the issue of whether the variance requested stems from a condition which is unique to the property at issue and not ordinarily found in the same zone or district, Ms. Abrams stated that "[i]t doesn't necessarily meet that, but again we told him to come back here on this * * *[.]"[29]

The court understands that the Board of Zoning Appeals was presented with this unique situation and attempted to resolve the situation in a way it deemed fair. However, other than the discussion above by Ms. Abrams, there was little to no other discussion of the requirements set forth in the zoning ordinance and R.C. 519.14(B) that must be met to grant a use variance. The zoning ordinance defines clearly the standard an applicant must meet in order to demonstrate an unnecessary hardship.

It was acknowledged at the meeting that the application did not "necessarily" meet at least one of the requirements, which is that the variance requested stems from a condition which is unique to the property at issue and not ordinarily found in the same zone or district. Furthermore, in reference to whether the hardship was created by the

[27] Notice of Filing of Transcript of Proceedings, filed Jan. 8, 2014, Transcript of October 17, 2013 meeting at pg. 14.
[28] Id.
[29] Id. at pg. 15.

actions of the applicant, Ms. Abrams stated that she did not know that the hardship was created by the actions of Mr. Slattery because the Board of Zoning Appeals suggested that he file for the use variance. However, the application for the use variance was filed after Mr. Slattery's application for a conditional use variance was denied by the Board. The simple fact that the Board suggested that Mr. Slattery could file for a use variance does not mean that any hardship at issue was not created by the actions of the applicant.

Based on the state of the record, the court cannot find that there is a preponderance of reliable, probative, and substantial evidence supporting the Board's decision. The standards required to grant a use variance, and particularly the requirement of demonstrating an unnecessary hardship, were not met in this case. As a result, the court cannot make any finding other than that the decision of the Board was arbitrary and unsupported by the preponderance of substantial, reliable, and probative evidence.

The court again emphasizes that the Board was faced with a difficult decision in this instance. However, the fact remains that the application did not meet the standard of demonstrating an unnecessary hardship, which is required by both R.C. 519.14(B) and Section 5.06(D) of the Batavia Township Zoning Code. Therefore, the court cannot uphold the decision of the Board of Zoning Appeals in this case.

CONCLUSION

The decision of the Batavia Township Board of Zoning Appeals is hereby reversed.

IT IS SO ORDERED.

DATED:_____ _____
Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent by e-mail on this _____ day of November 2014 to the following parties and/or counsel:

Harry Finke at hfinke@graydon.com
1900 Fifth Third Center
511 Walnut Street
Cincinnati, Ohio 45202

Christopher Moore at cmoore@smbplaw.com
Lawrence Barbiere at lbarbiere@smbplaw.com
5300 Socialville-Foster Road, Suite 200
Mason, Ohio 45040

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Administrative Assistant to Judge McBride