2018 IL App (1st) 171300-U

SECOND DIVISION
April 24, 2018

No. 1-17-1300

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JAMES MICHAEL FAIER, Plaintiff-Appellant, v. ZONING BOARD OF APPEALS OF THE CITY OF CHICAGO, 658 MELROSE, LLC, and HOWARD GOLDMAN, Defendants (Zoning Board of Appeals of the City of Chicago and 658 Melrose, LLC, Defendants-Appellees).	)	Appeal from the Circuit Court of Cook County No. 2016 CH 09907 Honorable Thomas Allen, Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Presiding Justice Neville and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: Circuit court's order affirming decision by Zoning Board of Appeals of the City of Chicago to grant variance for 658 Melrose, LLC affirmed; Board's decision was not against the manifest weight of the evidence.

¶ 2 This case arises from plaintiff-appellant James Michael Faier's opposition to defendant-appellee 658 Melrose, LLC's application for a variance from the Chicago

zoning ordinance before co-defendant-appellee, the Zoning Board of Appeals of the City of Chicago (the Board). 658 Melrose sought to construct a 4-story, 2-unit building with an attached four-car garage and a rear deck on 658 Melrose Street in Chicago, which is west of Faier's property, located at 656 Melrose Street. The lot at 658 Melrose is zoned "RM-5" for multi-unit residential buildings and has dimensions of 25 feet wide by 116 feet deep. A standard lot in the city of Chicago is 25 feet by 125 feet.

¶ 3 Prior to building, 658 Melrose sought the following variations from the zoning ordinance: (1) increasing the height of the building from 45 feet to 48 feet; (2) reducing the west yard setback from 2 feet to 4 inches; (3) reducing the overall side yard setback from 5 feet to 2 feet, 4 inches; and (4) reducing the rear yard setback from 34.83 feet to 12.43 feet. In its initial application, 658 Melrose also sought an east yard setback (adjacent to Faier's property), but at the time of the hearing, it eliminated this request, stating that it would be able to maintain a two foot east yard setback as required under the Code. Chicago Municipal Code § 17-2-0309-A.

¶ 4 The Board held a hearing on these variance requests on April 15, 2016. In addition to Faier, Howard Goldman, who lives at 650 Melrose, also appeared as an objector. At the hearing, 658 Melrose introduced testimony from the manager of the LLC, Andrew Smith, the general contractor and builder, David Berger, and land planner George Kisiel.

¶ 5 Smith testified that the short dimensions of the lot and the lack of a rear alley would create a hardship when building. He explained that because there was no rear access to the lot, a garage could not be constructed behind the residence, but needed to be underneath the building. According to Smith, strict compliance with the zoning code

would not permit a reasonable return and the variations requested would not alter the character of the neighborhood.

¶ 6 Counsel for objectors attempted to ask Smith how much he paid for the property, but the Board sustained 658 Melrose's objection to that line of questioning, saying "[W]e can talk about what he expected that return to be in terms of percentages or differences. *** I don't think it's necessary for him to tell us what he paid for the property."

¶ 7 Berger testified that the need for a rear setback variation was based on the fact that the lot was 9 feet shallower than the standard depth of 125 feet. And the need for a variation in the west and overall side yard setbacks as well as the variation in height was due to the fact that the garage had to be constructed underneath the building.

¶ 8 Finally, 658 Melrose presented the testimony of Kisiel, who the board *sua sponte* recognized as an expert given that he testified before it "many times." Kisiel is the president of Okrent & Kisiel Asosciates, Planning and Zoning Consultants. Kisiel agreed with Smith and Berger that the shallow depth of the lot and the lack of alley access required building a garage below the residence, which would occupy 1,000 square feet of otherwise buildable space. With regard to the rear and west yard variation requests, Kisiel testified that these were necessary because the garage displaced otherwise habitable space on the property. Finally, the need for what Kisiel termed a "minor" height variance was due to the fact that the garage underneath the building would force the ground floor six feet above grade.

¶ 9 Kisiel testified that the short lot and the lack of alley access was unique to both the property and the Melrose block and was generally not found in other RM5 districts or the Lakeview neighborhood. And Kisiel opined that the size and amenities of the other

residences in the Lakeview neighborhood could not be accommodated without the variations 658 Melrose were requesting. In other words, the variations were necessary in order to conform the building, as constructed, to the existing character of the neighborhood and without them, 658 Melrose would be unable to earn a reasonable return.

¶ 10 As part of his case in chief, Faier presented testimony from his co-objector, Howard Goldman, who is a licensed architect and contractor and who the Board recognized as an expert. Goldman was able to build a two-unit property at 650 Melrose without variations from the Code, despite the fact that his lot was also 25 feet by 116 feet. Goldman further testified that he made a profit on the sale of the top unit on his property.

¶ 11 Faier testified on his own behalf that he that he lived at 656 Melrose with his wife and three children. He admitted that he, too, requested variations from the Board when building his single family home, which were granted. However, he complained that the variations 658 Melrose was seeking would block the light to his children's bedroom windows and prevent him from undertaking maintenance on his property.

¶ 12 In closing, 658 Melrose introduced into evidence the Board's September 2003 resolution granting Faier's variation requests for a 1.33 feet reduction in the overall side yard setback, a reduction of 8.8 feet in the rear yard setback, and an increase in height from 42 to 45 feet when building his residence at 656 Melrose Street. The Board specifically found that "due to the dimensions of [656 Melrose] it cannot yield a reasonable return if permitted to be used only under the conditions allowed by the regulations in the district in which it is located; that the plight of owner is due to unique circumstances; that the yard variations, if granted, will not alter the essential character of

the locality."

¶ 13 The Board ultimately granted the requested variances for 658 Melrose in a detailed written resolution issued on June 22, 2016, in which it found Kisiel "very credibl[e]" and concluded that strict compliance with the zoning regulations would create practical difficulties for the property given its substandard lot depth and lack of rear alley access.

¶ 14 Faier timely appealed to the circuit court on July 12, 2016, but did not request a stay of the Board's resolution pursuant to section 3-111 of the Administrative Review Act, 735 ILCS 5/3-111 (West 2014). The circuit court affirmed the Board's decision in April 2017, and in the interim, 658 Melrose obtained building permits and completed construction of the property, in which Smith currently lives with his family.

¶ 15 ANALYSIS

¶ 16 At the outset, we address whether this appeal is moot given the completion of construction of the residence at 658 Melrose. At our direction, the parties filed supplemental briefs discussing this issue. 658 Melrose maintains that this case is moot given that Faier failed to request a stay of either the Board's resolution or a stay of the issuance of the building permit while his appeal was pending and instead stood by as construction was completed. Faier, on the other hand, argues that the completion of construction of a property for which a variance has been granted does not render moot an appeal from the grant of that variance. In support of his argument, Faier relies on *Heft v. Zoning Board of Appeals of Peoria County*, 31 Ill. 2d 266, 271 (1964), which we find persuasive.

¶ 17 In *Heft*, the Greater Chillicothe Sanitary District sought a variance to construct a

sewage disposal plant, to which the plaintiff objected. *Id.* at 267. The Zoning Board of Appeals of Peoria County granted the variance, and plaintiff filed a complaint for administrative review in circuit court, but did not seek a stay from the Board's decision while his complaint was pending. *Id.* The supreme court rejected the contention that the appeal was moot in light of the near-completion of the sewage plant, holding "if this were the case, the remedy of administrative review of a decision of the Zoning Board of Appeals would be rendered wholly ineffective." *Id.* at 271. The same is true here. The Administrative Review Act does not require a losing party to request a stay in order to preserve his appeal rights, and Faier's failure to do so does not render this case moot.

¶ 18 Turning then to the merits, the parties agree that we review the decision of the circuit court *de novo* (see *Weinstein v. Zoning Board of Appeals of City of Highland Park*, 312 Ill. App. 3d 460, 464 (2000)), but dispute the standard of review applicable to the Board's decision. Our supreme court has explained that our review of the decision of an administrative agency depends on whether the question presented is one of fact, one of law, or a mixed question of law and fact. *Beggs v. Board of Education of Murphysboro Community Unit Schools District No. 186*, 2016 IL 120236, ¶ 50.

¶ 19 Faier contends that the Board decided a mixed question of law and fact, subject to review under a "clearly erroneous" standard, while 658 Melrose argues that the Board decision was solely one of fact and should be reviewed under the more deferential manifest weight of the evidence standard. A mixed question of law and fact examines "the legal effect of a given set of facts" or, stated differently, whether uncontested facts satisfy the statutory standard. *Comprehensive Community Solutions, Inc. v. Rockford School District No. 205*, 216 Ill. 2d 455, 472 (2005).

¶ 20 Here, the issue is not whether the Board correctly applied the zoning ordinance to uncontested facts, but whether 658 Melrose presented evidence satisfying the ordinance's requirements for granting a variance. This is clearly a question of fact, and as such, is reviewed under a manifest weight of the evidence standard. See *Weinstein*, 312 Ill. App. 3d at 464 (reviewing decision of zoning board to grant a variance under manifest weight of the evidence). We will not disturb the Board's factual findings unless the opposite conclusion is clearly evident. *Kimball Dawson, LLC v. City of Chicago Department of Zoning*, 369 Ill. App. 3d 780, 786 (2006). It is not sufficient if a contrary conclusion is reasonable, or if we might have reached a different decision; rather, if there is anything in the record that "fairly supports" the conclusions of the agency, the decision must be affirmed. *Caliendo v. Martin*, 250 Ill. App. 3d 406, 416 (1993).

¶ 21 Pursuant to the zoning ordinance of the Chicago Municipal Code (the Code), in order to approve a variation request, the Board must make findings that (1) strict compliance with the zoning ordinance would create "practical difficulties or particular hardships" for the property; and (2) the variation requests are consistent with the purpose and intent of the ordinance. Chicago Municipal Code § 17-13-1107-A. The Code further states that when determining whether practical difficulties or particular hardships exist, the Board must find evidence that (1) the property in question cannot yield a reasonable return if required to comply with the zoning ordinance; (2) the difficulties or hardships are due to unique circumstances and are not generally applicable to other similarly situated property; and (3) the variation will not alter the essential character of the neighborhood. Chicago Municipal Code § 17-13-1107-B. Finally, the Code lists "other review factors" the Board must consider, which include whether (1) the physical

surroundings, shape or topographical condition of the property would result in a particular hardship upon the property owner – as opposed to a mere inconvenience – if the owner was required to comply with the zoning ordinance; (2) the conditions on which the variation request is based are generally inapplicable to other property within the same zoning classification; (3) the purpose of the variation is not based exclusively on the desire to make more money out of the property; (4) the practical difficulty or particular hardship has not been created by the person having an interest in the property; (5) the granting of the variation will not be detrimental to the public welfare or injurious to other property in the neighborhood in which the subject property is located; and (6) the variation will not impair an adequate supply of light and air to adjacent property. Chicago Municipal Code § 17-13-1107-C.

¶ 22 Faier limits his challenge on appeal to the Board's conclusion that requiring compliance with the zoning ordinance would create a practical difficulty or particular hardship for 658 Melrose, arguing that 658 Melrose presented insufficient evidence of the three factors.

¶ 23 Turning first to the issue of reasonable return, Faier argues that 658 Melrose's failure to provide data such as purchase price and rental prices for comparable properties in the area is fatal to its claim that it cannot earn a reasonable return without the requested variations. For this proposition, Faier relies heavily on *Lincoln Central Ass'n v. Zoning Board of Appeals*, 30 Ill. App. 3d 258 (1975). There, Roosevelt Memorial Hospital (the lessee of the subject property) sought a variance to build an addition and a special use to build a parking garage. *Id.* at 260, 262. The Board granted the variance and special use, but the circuit court reversed and this court affirmed, holding, in relevant part, that

Roosevelt failed to prove that it could not earn a reasonable return on the property as presently used. *Id.* at 260, 269. This court noted that the property owner did not reveal the price he paid for the property or its current market value, and Roosevelt did not disclose the amount of its rent: in short, there was no evidence "whatsoever" on the subject of reasonable return. *Id.* at 266. Instead, Roosevelt took the position that it was not bound by zoning laws due to its status as a not-for-profit hospital. *Id.*

¶ 24 We do not read *Lincoln Central* to stand for the proposition that the only way to provide evidence of inability to earn a reasonable return is through the use of financial data. Rather, the decision in *Lincoln Central* rested on the applicant's failure to provide *any* evidence of reasonable return. This is not the case here. While 658 Melrose did not disclose the price it paid for the property, it, unlike Roosevelt Hospital, presented other evidence on the issue of reasonable return. Specifically, 658 Melrose offered expert testimony from land planner George Kisiel, who opined that the variances were necessary in order to maintain consistency with the size and amenities of residences in the Lakeview neighborhood.[1] According to Kisiel, without the variances, "the value of the real estate asset and its continued functionality would be severely diminished." This testimony was not mere speculation, as Faier maintains, but was based on Kisiel's examination of the size and amenities of other homes in the neighborhood. The Board found Kisiel credible, and we will not disturb that determination on appeal. See *Kraft Foods, Inc. v. Illinois Property Tax Appeal Board*, 2013 IL App (2d) 121031, ¶ 51 (on administrative review, court does not reassess credibility of witnesses).

[1] Faier challenges the Board's acceptance of Kisiel's testimony absent a *Frye* hearing, but it is sufficient to note that *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), applies to scientific testimony and has no relevance here.

¶ 25 Faier goes on to challenge the Board's conclusion that the hardships 658 Melrose would face if it were to build in compliance with the Code are due to unique circumstances and are not common to similarly situated property. The parties dispute the meaning of the word "unique" as used in the Code, which presents an issue of statutory construction that we review *de novo*. See *People v. Chenoweth*, 2015 IL 116898, ¶ 20.

¶ 26 The Code provides that words not expressly defined in the zoning ordinance have the meaning given in the latest edition of Merriam-Webster's Collegiate Dictionary. Chicago Municipal Code § 17-1-1602. Merriam-Webster offers several definitions of "unique:" Faier urges us to adopt the narrow definition, meaning "the only one: sole" while 658 Melrose argues that the broader definition – "unusual" – is appropriate. See Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/unique.

¶ 27 We must give statutory language its plain, ordinary, and popularly understood meaning and afford it the "fullest, rather than the narrowest, possible meaning to which it is susceptible." *Carver v. Sheriff of LaSalle County*, 203 Ill. 2d 497, 507 (2003). Moreover, words and phrases should not be construed in isolation, but must be interpreted in light of other relevant provisions of the statute. *Id.* at 507-08.

¶ 28 Here, the Code requires the Board to find evidence that the practical difficulties and particular hardships faced by the party seeking a variance "are due to unique circumstances and are not *generally* applicable to other similarly situated property." Chicago Municipal Code 17-13-1107-B (emphasis added). Read alongside the requirement that the difficulties must not be *generally* applicable to similar property, we conclude the City Council likely intended unique to mean "unusual"' as opposed to "the

only one." Our interpretation is supported by the rule requiring us to construe statutory language in its broadest rather than its narrowest sense. See *Carver*, 203 Ill. 2d at 507

¶ 29 Having determined that unique is synonymous with "unusual," we conclude that the evidence at the hearing supported the Board's finding of unique circumstances. Kisiel testified that other lots in other RM-5 zoning district and in the Lakeview community do not share the short depth and lack of alley access that 658 Melrose suffers. Rather, the standard lot size throughout the city of Chicago is 25 feet by 125 feet and includes rear alley access. See Chicago Municipal Code § 17-17-02174 (defining a lot depth of less than 125 feet as "substandard").

¶ 30 While Faier points out that all lots on the 600 block of Melrose (as well as several other lots in the immediate vicinity) are short and lack rear alley access, we cannot conclude that the Board erred in instead accepting Kisiel's broader comparison of 658 Melrose to other lots in the RM-5 zoning district to support its finding of unique circumstances. This is particularly true where the Code itself suggests that the relevant comparison is "to other property within the same zoning classification." Chicago Municipal Code § 17-13-1107-C.

¶ 31 Finally, Faier maintains that the Board erred in finding that the variances requested by 658 Melrose would not alter the character of the locality. Faier contends that granting the variances allowed 658 Melrose to build the widest residence on the 600-700 block of Melrose. Accepting this as true, this is not necessarily dispositive on the issue of whether the variances would alter the character of the neighborhood. The Board heard other evidence, primarily from Kisiel, that suggested that notwithstanding the variances 658 Melrose was requesting, it would nevertheless conform to the

neighborhood's character. For example, Kisiel opined that the style and "general configuration" of the house "neatly match" the adjacent residences. And although the variances would diminish the side yard setback, Kisiel testified that all the residences on Melrose have minimal west yard setbacks with most setbacks on the east yard. Indeed, the previous residence on the 658 Melrose lot had a west yard setback of approximately 4 inches, identical to what 658 Melrose was requesting for its new construction. Taken together, these facts support the Board's conclusion that the variances 658 Melrose is seeking do not alter the character of the neighborhood, although it may be the widest residence on the block.

¶ 32 Given that the Board's decision to grant the requested variances was amply supported by evidence on the issues of reasonable return, unique circumstances, and conformity to the essential character of the neighborhood, we cannot find the decision against the manifest weight of the evidence.

¶ 33 Affirmed.