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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

TWO DOCS, LTD., ET AL
Plaintiff

BOARD OF ZONING APPEALS OF THE CITY, ETC., ET AL
Defendant

Case No: CV-17-886269

Judge: SHANNON M GALLAGHER

JOURNAL ENTRY

98 DISPOSED - FINAL

JUDGMENT ENTRY AND OPINION REVERSING THE BOARD OF ZONING'S RESOLUTION. O.S.J.
COURT COST ASSESSED AS DIRECTED.
PURSUANT TO CIV.R. 58(B), THE CLERK OF COURTS IS DIRECTED TO SERVE THIS JUDGMENT IN A MANNER PRESCRIBED BY CIV.R. 5(B). THE CLERK MUST INDICATE ON THE DOCKET THE NAMES AND ADDRESSES OF ALL PARTIES, THE METHOD OF SERVICE, AND THE COSTS ASSOCIATED WITH THIS SERVICE.

Judge Signature Date

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CLERK OF COURTS
CUYAHOGA COUNTY

- 98
02/15/2018

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY

TWO DOCS, LTD., ET AL. Appellant, vs. BOARD OF ZONING APPEALS OF THE CITY OF CLEVELAND, ET AL. Appellee,	)))))))))	CASE NO. CV-17-886269 JUDGE SHANNON M. GALLAGHER **JUDGMENT ENTRY AND OPINION**

***Shannon M. Gallagher, J.*:**

Appellants Two Docs, LTD and Tremont Enterprises, LLC, appeal a Resolution from the City of Cleveland Board of Zoning Appeals. The Resolution upheld a Notice of Violation issued to Appellants for the installation of four duck pin bowling machines at Appellants' restaurant. The Resolution issued by the City of Cleveland Board of Zoning Appeals was arbitrary, unreasonable, and unsupported by the preponderance of substantial, reliable, and probative evidence. R.C. 2506.04. The Board of Zoning's decision to uphold the Notice of Violation is reversed.

I. Background Facts and Procedural History

Appellant Two Docs is the owner of the land and building located at 2221 Professor Street, Cleveland, Ohio (the "Property"). Appellant Tremont Enterprises owns and operates a bar/restaurant on the first floor of the Property.

In 2013, Tremont Enterprises was issued a Certificate of Occupancy to operate a bar/restaurant on the Property. In 2014, Tremont Enterprises applied for a new Certificate of Occupancy to operate its bar/restaurant, which encompassed a newly added covered patio and open courtyard dining area. For several years Tremont Enterprises operated a restaurant/bar on

the Property called "Press." At some point, Appellants rebranded the Property under the name "Hi and Dry."

In June 2017, Tremont Enterprises purchased four free-standing duck pin bowling machines and placed them in the rear of the restaurant. On July 6, 2017, Tremont Enterprises applied to the City of Cleveland for a Consolidated Entertainment and Amusement Device License to operate the duck pin bowling machines pursuant to Cleveland Codified Ordinances 692A.01 and 692A.03.

On June 23, 2017, City employee Robert Santora issued a Notice of Violation to Appellants, charging that there was an unauthorized change in the use of the Property due to the installation of the four duck pin bowling machines, in violation of City of Cleveland Codified Ordinance 327.02(C). Pursuant to Ordinance 327.02(C), there shall be no change or substitution of the use of any building or premises and no extension of any existing use, nor shall any premises be occupied for any new use until a certificate of occupancy has been issued. Mr. Santora advised in the comments section of the Notice that the "Owner needs to obtain a permit for the use of a bowling alley in the rear of the building."

Appellants appealed the Notice of Violation to the Cleveland Board of Zoning Appeals. On September 5, 2017, the Board conducted a hearing and took evidence. The Board considered whether the Notice of Violation was illegal, arbitrary and capricious, unreasonable, or unsupported by a preponderance of substantial, reliable, and probative evidence, and ultimately upheld the Violation. (Transcript p. 5).

Appellants' representative, David Rudiger, testified that the "bowling is less than ten percent of our business" and that the Property is still primarily being used as "a full time restaurant." (Transcript at 11). Kevin Brennan, the attorney representing Appellants during the

hearing, estimated that the bowling machines take up less than 500 square feet in a building of approximately 5000 square feet. (Transcript p. 22). Mr. Rudiger described the duck pin bowling machines as being similar to a skee-ball game in that they are not built into the building. The machines have no bowling chute and use small pins that are on strings. (Transcript p. 24).

The City Zoning Administrator, Richard Riccardi, testified on behalf of the Board upholding the Notice of Violation. Mr. Riccardi was not the inspector who observed the Property and issued the Notice of Violation. That inspector was not available for testimony.

Rather than focusing on whether or not Appellants had begun using the Property as a bowling alley, Mr. Riccardi testified that Appellants' use of the Property had changed the Property to an "amusement establishment." Mr. Riccardi testified that "at some point when you acquire enough amusement devices, [the Property] becomes an amusement use" that would require a new occupancy permit. (Transcript p. 20).

Mr. Riccardi stated that the intent of the zoning code is to treat uses that have different impact on the neighborhood differently. Mr. Riccardi admitted that there were no real criteria or threshold or baseline that triggers when an establishment becomes an amusement use. However, he argued that at some point an establishment "becomes an amusement use significantly or it becomes an amusement use such that the impact has to be engaged on the neighborhood." (Transcript p. 12, 20).

Rather than relying upon a codified definition to determine whether there was a change in use, Mr. Riccardi provided an arbitrary set of criteria.[1] He stated that the Department of Building and Housing will look at the floor space dedicated to the amusement devices and/or

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[1] Mr. Riccardi testified at one point that there was a definition in the Cleveland Codified Ordinance for "amusement establishment." (Transcript p. 21). However, no definition was provided during the hearing, within the Resolution issued by the Board, or within the briefing before this Court.

how the business is marketing itself to determine if the use has changed to entertainment/amusement. The Department will ultimately use this criteria to determine whether the amusement devices are accessory to the restaurant or whether the amusement use has become the main attraction for bringing in patrons. (Transcript p. 12-13).

Mr. Riccardi could not provide a specific threshold for how many amusement devices a restaurant can install before they become an amusement establishment. Mr. Riccardi testified that if a restaurant has one machine, it has not changed use. But if a restaurant has ten machines and advertises a league, then it could be considered a change in use. (Transcript p. 20). However, there is "nothing in the Zoning Code that says when you have four or five or six you're an amusement establishment, you know, but if you have three you're not." (Transcript p. 20).

Mr. Riccardi relied upon a news article and a Facebook page in support of his argument that the Property has changed from a restaurant to some other "amusement use." The news Article from Cleveland.com was written by Plain Dealer reporter John Petkovic. The Article indicated that the duck pin bowling is "the main attraction at Hi and Dry." (Transcript p. 14). An individual named Sherman DeLozier, identified only as a business partner of the restaurant, was interviewed for the Article and stated that "we're not a full scale restaurant . . . It's more about drinks and games." Mr. DeLozier did not testify at the hearing. Mr. Riccardi produced printed copies from Hi and Dry's Facebook page advertising bowling leagues and an employment position to run the bowling lanes. The Facebook page included a photo of the restaurant's sign with its slogan "Bowling & Beer."

Chairwoman of the Board, Carol Johnson, presented two letters from individuals in the neighborhood, Dr. Heinz Mikota and Janet Zibert. Dr. Mikota and Ms. Zibert objected to the

noise of the establishment in general, including from the crowd, music, and motorcycles revving. (Transcript p. 8).

On September 11, 2017, the Board issued a Resolution upholding the Notice of Violation and determined that Appellants' use of the Property had changed from a restaurant/bar to an amusement establishment due to the installation of the four duck pin bowling machines in violation of Cleveland Codified Ordinance 327.02(C).

II. Law and Analysis

This appeal is governed by Revised Code Chapter 2506. Pursuant to R.C. 2506.04, the standard of review enables the court to reverse the administrative body's decision only upon a finding that the decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. The court must proceed under the presumption that the decision of the administrative agency is reasonable and valid. *Community Concerned Citizens, Inc. v. Union Twp. Bd. of Zoning Appeals*, 66 Ohio St.3d 452, 456, 613 N.E.2d 580 (1993); *Mayfield Hts. v. Snappy Car Rental*, 110 Ohio App.3d 522, 526, 674 N.E. 2d 1193 (8th Dist. 1995).

The Board's decision finding that the Property had changed to an amusement establishment in violation of Ordinance 327.02(C) was arbitrary and unreasonable because it did not rely upon any specific criteria to determine what constitutes an amusement use.

The Board never defined "amusement/entertainment use" or "Amusement Establishment." As Mr. Riccardi testified, "There's no real criteria or threshold or baseline that triggers when an establishment becomes an amusement use." (Transcript p. 20). Mr. Riccardi then provided an arbitrary set of criteria that the Department of Building and Housing could consider when issuing change of use violations. (Transcript p. 12-13). Mr. Riccardi did not

clear standard by which a property owner would know when a use is changed from a restaurant to an amusement use. The Board's Resolution relied upon Mr. Riccardi's arbitrary set of criteria rather than any clear standard within the codified ordinance.

Much of the evidence the Board relied upon, including the Facebook page, Cleveland.com article, and letters from community members, provided unsubstantiated opinions about the nature of Hi and Dry's business. A Board's decision must be supported by direct evidence and not speculative comments or unsubstantiated public opinion presented at the hearing. *Community Concerned Citizens, Inc. v. Union Twp. Bd. of Zoning Appeals*, 66 Ohio St. 3d 452 (1993).

The Board's Resolution did not discuss whether the Property had become a bowling alley, as indicated in the Notice of Violation. The Notice of Violation's determination that the Property had become a bowling alley was unsupported by the preponderance of substantial, reliable, and probative evidence.

The City's ordinance governing Bowling Alleys, City Ordinance 689.01, states that no person shall operate a bowling alley unless a permit is obtained. "Bowling Alley" is not defined within the ordinance. The plain meaning of a "Bowling Alley" would at a minimum incorporate standard bowling lanes, bowling balls, and bowling pins.

Based upon the evidence presented at the hearing, Appellants' addition of the duck pin bowling machines to the Property does not change the use into a bowling alley. The duck pin bowling machines do not utilize traditional bowling balls, do not have a bowling chute, have smaller pins that are on strings, are not built into the building, and use a different scoring system. (Transcript p. 24).

The machines at issue more appropriately fit the definition of "Amusement Device" defined in Ordinance 692A.01. Amusement Devise means "any electronic and/or video machine or mechanical device, including pinball machine, which, upon the insertion or deposit of a coin, slug, token or disc, permits a person or operator using such device, whether or not registering a score, to secure some amusement, enjoyment, entertainment or relaxation by the use of such machine or device."

Appellants are in the process of obtaining a license for the duck pin bowling machines, which is the proper avenue for permitting the installation of amusement devices pursuant to Cleveland Codified Ordinance 692A.03.

III. Conclusion

For the reasons outlined above, the Board's Resolution was arbitrary, unreasonable, and unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. R.C. 2506.04. The Board of Zoning's decision to uphold the Notice of Violation is reversed. Costs to Appellee City of Cleveland.

IT IS SO ORDERED:

Feb 20, 2019 — Shannon M Gallagher

Judge Shannon M. Gallagher **Date**