

DECISION
ZONING BOARD OF APPEALS
CITY OF CINCINNATI
HEARING DATE: OCTOBER 15, 2020

In re: :
: :
Appeal from the Zoning Hearing : **Case No. Z-4053-2020**
Examiner : :
1009-1015 Delta Avenue : :
Case No.: ZH20200030, ZH20200031 : **DECISION**
: :
Appellants: L&D Real Estate : :
Holdings, LLC; Center for Change : :
on Delta, LLC; : :
Kathleen F. Ryan, Esq. : :
Manley Burke, LPA : :
225 W. Court Street : :
Cincinnati, Ohio 45202 : :
: :
Appellee: Mt. Lookout Community : :
Council : :
Brian Spitler, President : :
Laura Whitman, Vice President : :
PO Box 8444 : :
Cincinnati, Ohio 45208 : :

SUMMARY OF DECISION:

The Zoning Hearing Examiner’s decision is **affirmed** in part and **reversed** in part, and this matter is **remanded** for further proceedings in accordance with this Decision.

THE ZBA RECORD:

1. The Perfected Zoning Board of Appeals Application including supporting documentation.
2. ZHE Record.
3. Appellee Mt. Lookout Community Council Notice of Appearance.
4. Appellee Mt. Lookout Community Council Appellate Written Argument
5. Letter from Tony and Jennifer Raabe
6. Transcript of Proceedings.

PUBLIC HEARING:

The Zoning Board of Appeals (“Board”) is a quasi-judicial body empowered to hear appeals arising out of the Cincinnati Zoning Code (“CZC”) and Land Development Code as set forth in CZC Chapter 1449.

The Board conducted a public hearing on October 15, 2020, (“Hearing”) on the above-cited appeal. The Board mailed notice to all persons entitled to receive notice of the appeal. Also, the Board published prior notice of the Hearing on the appeal in the *City Bulletin*. A quorum of Board members under Section 4 of the Board’s Rules of Procedure were present throughout the Hearing.

The Board makes the following findings of fact and conclusions of law after being fully apprised of the issues after review and consideration of the evidence in the record and the written and oral arguments presented to the Board.

PROCEDURAL FACTS

1. On September 11, 2020, the Appellants, through their legal counsel Kathleen F. Ryan, properly submitted a Notice of Appeal of the Decision of the Zoning Hearing Examiner (“ZHE”) denying certain requests for relief to construct a new development at 1009-1015 Delta Avenue (“Property) in the Mt. Lookout neighborhood.
2. The Appellants, their legal counsel Kathleen Ryan and their representatives Barry Rosenberg, Paul Schirmer, Seth Oakley, Craig Abercrombie, and Sari Lehtinen, submitted written argument in support of their positions and attended the Hearing before the Board.
3. Appellee Mt. Lookout Community Council (“MLCC”), through its representatives Brian Spitler and Laura Whitman, made a proper appearance in this matter, submitted written argument contra certain of the Appellants’ positions, and attended the Hearing before the Board.

FINDINGS OF FACT:

1. The Board hereby adopts the ZHE’s factual findings set forth in his decision on application numbers ZH20200030 and ZH20200041 dated July 22, 2020 (“ZHE Decision”), which factual findings shall be incorporated herein and shall become a part hereof.
2. The Property is located in the Mt. Lookout neighborhood. It is additionally situated in a CN-P, “Commercial Neighborhood-Pedestrian,” zoning district and

the Mt. Lookout Square Urban Design Overlay District.¹ Finally, the parcel at 1015 Delta Avenue is located within a Hillside Overlay District.²

3. The Appellants want to demolish several structures on the Property and to construct five two-story townhomes fronting on Delta Avenue and a five-story, 36-unit multi-family development with two levels of parking and three levels of residential units.
4. The Appellants argue that the ZHE Decision to deny certain requests for relief for the project is illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence. The relief denied by the ZHE includes a special exception to allow 5 recesses of 60 square feet each on the front façade of the building along the townhouses rather than the required 0 feet;³ a special exception to reduce a portion of the 10 foot buffer yard requirement where the project abuts an RM Zoning District; Urban Design Overlay District demolition permission⁴; and, Urban Design Overlay District new construction permission.⁵
5. The ZHE additionally approved relief which is not in controversy in this appeal including a variance request from front yard setback requirements and hillside development district permission for the front yard setback, cut and fill, and retaining wall height.
6. The Appellants' representatives who appeared at the Hearing pointed to portions of their testimony in support of their contentions.
7. Barry Rosenberg of Towne Properties indicated that his team had met with the community several times about the project and tailored several aspects of the proposed development's design to the community's suggestions including the proposed articulation and rear yard parking. While Mr. Rosenberg acknowledged that the scale of the project is larger than other buildings in the area, he stressed that it is within the height limits of the underlying zoning district and exceeds district parking requirements.
8. Paul Schirmer contended that the existing single-family home structures located on the Property, some of which are used for commercial purposes and must be demolished to make way for the proposed development, do not contribute to the Urban Design Overlay District and stressed that demolitions have been permitted in other Urban Design Overlay Districts without strict compliance to the Code. He also noted that the CN-P zoning district extends to the existing single-family home

¹ Cincinnati Municipal Code § 1400-17 and Map 1400-17.

² Cincinnati Municipal Code § 1433-05.

³ Cincinnati Municipal Code § 1409-09.

⁴ Cincinnati Municipal Code § 1423-13(A).

⁵ Cincinnati Municipal Code § 1423-09(h).

structures currently being used for commercial purposes and argued this reflects an intent to redevelop this portion of Mt. Lookout Square.

9. Architect Seth Oakley confirmed that the proposed recesses were designed with community feedback and will create an interactive and attractive development. Mr. Oakley also maintained that the articulation of the building minimizes the scale of the structure.
10. Civil engineer Craig Abercrombie contended that the proposed buffer yard reduction is necessary for safe traffic circulation and additional parking.
11. Architect Sari Lehtinen argued that the project will create a pedestrian-friendly environment, as it will be built nearly to the street while also improving the area's traffic pattern by relocating several curb cuts. She stressed that although the proposed building is large, it has a distinct articulation and is designed to appear as several smaller buildings by using a variety of colors/materials and stepping the building down the street. Ms. Lehtinen opined that Mt. Lookout Square has no architectural commonality.
12. Ms. Ryan argued that the ZHE incorrectly focused on the entire project when making several of his rulings rather than the individual aspects of the project and stressed that several of the denials related to aspects of the project favored by the community.
13. Ms. Ryan argued that the ZBA should reverse the ZHE decision relating to the special exception from buffer yard requirements because the small reduction will allow an access drive and enhanced circulation at the Property. She also stressed that one of the Appellants owns the property that abuts the area of the development where the buffer yard would be reduced.
14. As to the special exception related to the recesses, Mr. Ryan maintained they would not have an adverse impact on the district, but instead would specifically address several district design guidelines most notably to provide more street-level interaction between the building and the street, to provide visual interest, and to enhance the residential character of the project.
15. Ms. Ryan argued that the ZHE decision denying demolition permission violates due process because it prohibits demolition under any circumstance absent a safety hazard. Ms. Ryan stressed that the project would result in the construction of a conforming development and the demolition of several nonconforming structures.
16. Ms. Ryan maintained that the ZBA should reverse the ZHE Decision denying new construction permission because the proposed development conforms to the standards of the Mt. Lookout Square Urban Design Overlay District and numerous aspects of the Mt. Lookout Urban Design Plan including: (1) presenting the

building as multiple, separate buildings; (2) matching the “sawtooth” orientation of other building patterns in the district; (3) similar height, and (4) conforming window placements with no large expanse of blank wall space.

17. The MLCC maintained that the ZBA should uphold the ZHE’s Decision because the proposal is inconsistent with the standards of the Mt. Lookout Square Urban Design Overlay District and the Mt. Lookout Urban Design Plan. More specifically, the MLCC argued that the project is unsuited to the Urban Design Overlay District in terms architectural style, bulk, shape, massing, scale, and form and is incompatible with its smaller-scale, neighborhood business district.

CONCLUSIONS OF LAW:

1. Under Cincinnati Municipal Code § 1449-17, the Board considers the whole record to determine whether the ZHE Decision is illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence. The Board may affirm, reverse, vacate, or modify the ZHE Decision or remand the matter to the ZHE.
2. Substantial evidence has “some weight . . . importance and value.”⁶ Reliable evidence is “dependable . . . it can be confidently trusted.”⁷ Probative evidence “tends to prove the issue in question [and is] relevant in determining the issue.”⁸
3. The Appellants have the burden of proof.
4. Upon review of the whole record and consideration of the arguments presented to the Board at the Hearing, the Board affirms the ZHE Decision in part and reverses the ZHE Decision in part. It also remands this matter for further proceedings in accordance with this Decision.

Special Exceptions

5. Under the Zoning Code, an applicant seeking a special exception must make two showings. First, the applicant must demonstrate that its project conforms to all applicable laws, ordinances, and regulations, and is in the public interest. The determination is made after weighing the factors established by the Zoning Code.⁹ Those seeking a special exception must then demonstrate that that the special exception is appropriate in the proposed location.¹⁰ This requires evidence that the proposed development:

⁶ *Our Place, Inc. v. Ohio Liquor Control Com.*, 63 Ohio St.3d 570, 571, 589 N.E.2d 1303 (1992).

⁷ *Id.*

⁸ *Id.*

⁹ Cincinnati Municipal Code § 1445-13.

¹⁰ Cincinnati Municipal Code § 1445-19.

- a. Is consistent with the purposes of the Zoning Code and the applicable zoning district;
 - b. Will not substantially diminish or impair the value of property within the neighborhood in which it is located;
 - c. Will not have an adverse effect on the character of the area or the public health, safety, and general welfare, and will be constructed, arranged, and operated to be compatible with the use and development of neighboring properties in accord with applicable district regulations; and
 - d. Complies with all other standards imposed on it by Zoning Code.
6. Upon review of the whole record and consideration of the arguments presented to the Board at the Hearing, the Board reverses the ZHE Decision as to the denial of a special exception for 5 recesses of 60 square feet each on the front façade of the proposed development and as to the denial of a special exception to reduce a portion of the buffer yard requirement.

The Appellants met their burden in showing that the ZHE Decision as to these aspects of the project is unsupported by a preponderance of substantial, reliable, and probative evidence in the whole record. A preponderance of substantial, reliable, and probative evidence in the whole record indicates these aspects of the project are in the public interest and meet the criteria for special exceptions.

The Appellants demonstrated that the small reduction from buffer yard standards and the proposed recess relief are consistent with the purposes of the Zoning Code, UDO District, and the CN-P Zoning District. While the proposals do not strictly meet the requirements of the code, the testimony and evidence in the record reveals that the buffer yard deviation is necessary to construct an access drive on the Property which will enhance circulation at the property so tenants, delivery trucks and the like can safely maneuver around the Property, while the recess relief is necessary to enhance the residential character of the project consistent with the Urban Design Overlay District standards by providing additional street-level interaction between the proposed development and the street.

The Appellants additionally demonstrated that the requested relief is compatible with the surrounding neighborhood and will not substantially diminish or impair the value of other property within the area or have an adverse effect on the character of the neighborhood.

Urban Design Overlay District New Construction Permission

7. An applicant wishing to undertake new construction in an Urban Design Overlay District must satisfy certain conditions.¹¹ These conditions include:
 - a. New buildings shall be compatible with their surroundings. Architectural style, bulk, shape, massing, scale and form of new buildings, and the space between and around buildings shall be consistent with the area, and should be in harmony with neighboring buildings;
 - b. New buildings shall respond to the pattern of window placement in the district. The designs of new buildings shall avoid long unrelieved expanses of wall along the street by maintaining the rhythm of windows and structural bays in the district. The preferred pattern of ground floor windows is open show windows, with inset or recessed entryways; and landscaping, lighting and other amenities equivalent to those existing in the district; and
 - c. Buildings shall de-emphasize secondary rear or side door entrances to commercial space, unless the entrances are associated with public parking areas.

In considering whether the conditions are met, the Zoning Hearing Examiner must also review and consider applicable community plans to determine whether the new construction is consistent with the plans' goals, objectives, and guidelines.

8. After considering the record of the ZHE and the arguments of the parties, the Board affirms the ZHE Decision on finding that the decision to deny Urban Design Overlay District permission to construct the proposed development on the Property is not illegal, arbitrary, capricious, unreasonable and that the decision is supported by a preponderance of the substantial, credible, reliable and probative credible evidence in the whole record.

The record demonstrates that the Appellants' development proposal for the Property is not fully consistent with the standards of the Mt. Lookout Square Urban Design Overlay District and the Mt. Lookout Urban Design Plan. A primary purpose of Urban Design Overlay Districts is to protect and enhance the physical character of selected business districts.¹² Another purpose of Urban Design Overlay Districts is to ensure that infill development does not adversely affect the physical character of the area.¹³

The Board is not convinced that the bulk, massing, and scale of the proposed development is consistent with the character of the Mt. Lookout Square Urban Design Overlay District. While the Mt. Lookout Square Urban Design Overlay District does not readily appear to have a common architectural style, structures

¹¹ Cincinnati Municipal Code § 1437-09(h).

¹² Cincinnati Municipal Code § 1437-01(a).

¹³ Cincinnati Municipal Code § 1437-01(d).

in the district share commonalities in terms of bulk, massing, and scale. The Appellants' 5-story, 36-unit proposed building would be the largest and tallest building in the district and would not fit with the district's existing buildings which tend to be small, compact structures with heights of 1-3 stories. Permitting the development as proposed would not advance the goals of the Mt. Lookout Square Urban Design Overlay District or the neighborhood's desired plan for the form of new buildings in the area.

Urban Design Overlay District Demolition Permission

9. To demolish a building in an Urban Design Overlay District, an applicant must demonstrate that:

Demolition has been ordered by the Director of Buildings and Inspections for reasons of public health and safety and then certain prescribed circumstances:

- The structure does not contribute to the architectural quality of the district;
- The demolition is necessary to accomplish the construction of a building which would meet the guidelines contained in the urban design plan;
- The demolition is necessary to provide parking and/or other uses in a manner specified in the urban design plan;
- The owner has endeavored in good faith to find a use for the structure and is unable to obtain a reasonable rate of return on the property; or
- Demolition has been ordered to remove blight.

10. Here, the Board did not reach the substance of the Appellants' claims because it finds that the ZHE essentially truncated his analysis in concluding that the plain and unambiguous language of the code section explicitly requires a demolition order before an Applicant can obtain Urban Design Overlay District permission to demolish a structure. The Board finds that a use variance as described in Cincinnati Municipal Code § 1445-16 may be considered when the ZHE determines that the standards of the Urban Design Overlay District cannot be met.

For this reason, after considering the record of the ZHE and the arguments of the parties, the Board remands the issue to the ZHE to consider the demolition request under the use variance standard found in Cincinnati Municipal Code § 1445-16.

MOTION: Mr. Jacob Samad:

I move to affirm the ZHE with respect to the determination of the variance of the front setback as well as affirm the determination with respect to the Hillside Overlay District permissions. I move to reverse the denial of the ZHE to deny the special exception related to the recessed areas and reverse the denial of the ZHE to deny the special exception related to the buffer yard reduction. I move to remand the denial of the hearing examiner for the demolition approval for the ZHE to consider the use variance standard pursuant to Cincinnati Municipal Code § 1445-16. I move to affirm the denial of the new construction approval provided the applicant is permitted to reopen its application and to provide a design more in keeping with the urban design standards.

Second: Mr. Michael Moran

VOTE:

Ayes:

Ms. Powell
Mr. Moran
Mr. Bennie
Mr. Samad

Nayes:
Ms. Supinger
Mr. Zielasko

/s/Emily Supinger
Emily Supinger, Chair
Zoning Board of Appeals

/s/ Kevin M. Tidd
Kevin M. Tidd, Staff Attorney
Zoning Board of Appeals

APPEALS:

This decision represents the final appealable order of the Zoning Board of Appeals and may be appealed to a court of competent jurisdiction pursuant to Ohio law.

The Board transmits a true and accurate copy of this final order by certified mail on this 7th day of December 2020, to the following persons:

Kathleen F. Ryan, Esq.
Manley Burke, LPA

225 W. Court Street
Cincinnati, Ohio 45202

Mt. Lookout Community Council
Brian Spitler, President
Laura Whitman, Vice President
PO Box 8444
Cincinnati, Ohio 45208

The Board transmits a true and accurate copy of this final order by interdepartmental mail on this 7th day of December 2020, to the following persons:

Emily Ahouse
Zoning Administrator