IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

HOMELESS CHARITY, et al.	)	CASE NO.: CV-2019-02-0684
	)	
Plaintiff	)	JUDGE SUSAN BAKER ROSS
-vs-	)	
	)	
AKRON BOARD OF ZONING APPEALS	)	**ORDER**
	)	
Defendant	)	

- - -

This matter is before the court on an administrative appeal of a decision of the Akron Board of Zoning Appeals. The matter has been fully briefed as follows: *Assignment of Error and Brief of Appellants The Homeless Charity, Sage Lewis LLC and Sage Lewis* filed on March 31, 2020; *Brief of Appellee Akron Board of Zoning Appeals* filed on June 20, 2020; and *Reply Brief of Appellants The Homeless Charity, Sage Lewis LLC and Sage Lewis* filed on July 17, 2020. For the reasons set forth herein, the appeal is denied and this matter is hereby dismissed.

I. INTRODUCTION

This matter arises from an ongoing dispute between the City of Akron (Akron) and Sage Lewis, Sage Lewis LLC and the Homeless Charity (Homeless Charity et al.) regarding a tent community that existed in the lot behind 15 Broad Street, Akron, Ohio. Sage Lewis LLC owns the property at issue. The building itself is zoned commercial and the outside area lot behind the building is zoned U1 – dwelling district. In April, 2018, Sage Lewis applied for a conditional use permit for the property. The Akron Planning Commission held a public hearing in June of 2018 and ultimately recommended that City Council deny the application. Akron City Council held a public hearing on the issue on September 10, 2018, and on September 17, 2018 voted to adopt the Planning Commission's recommendation to deny the conditional use permit. The Appellants herein filed an appeal of that decision in the Summit County Common Pleas Court. However, due to issues with service of the appeal the Appellants failed to perfect their appeal and the appeal was dismissed on February 14, 2019. That decision was affirmed

on appeal to the Ninth District Court of Appeals on December 26, 2019. The Ohio Supreme Court declined to take jurisdiction on April 28, 2020.

In the meantime, following the decision to deny the conditional use permit, and ongoing discussions, on December 6, 2018 the City of Akron Department of Planning and Urban Development issued its Notice of Violation/Order to Comply, which ordered that the tent community be disbanded. Appellants appealed this order to the Akron Board of Zoning Appeals (BZA) and sought a variance. Additional hearings were conducted, this time at the BZA level. On January 30, 2019, the BZA issued its Memorandum and its Decision affirming the Order to Comply and denying the request for variance. On February 21, 2019, the Appellants filed their administrative appeal pursuant to R.C. 2506.01 arguing that the decision was unreasonable, arbitrary, and capricious under the zoning code and further arguing constitutional violations.

II. LAW AND ANALYSIS

A. PRELIMINARY ISSUES

1. Standing

The BZA asserts that Sage Lewis on his own does not have standing in this matter. Additionally, BZA argues that none of the Appellants have standing to assert claims on behalf of non-party unspecified homeless individuals. This preliminary inquiry must be resolved before the Court may address the merits of the case. *Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322 (2010).

One has standing to bring an R.C. 2506.01 administrative appeal if his rights, duties, privileges, benefits, or legal relationships are directly affected by the decision sought to be appealed. R.C. 2506.01; *Schomaeker v. First Nat'l. Bank*, 66 Ohio St.2d 304 (1981). Sage Lewis LLC, as owner of the property, clearly has standing. Sage Lewis LLC is the party who filed the Appeal of Order to Comply and request for variance. The attachment to the Appeal

does list all three of the named Appellants herein. However, by owning the property as an LLC, the principals take the advantages and disadvantages together. As an LLC is a legal entity it is provided certain rights and protections by law. Sage Lewis in his individual capacity has no legal right to the property or ability to say what happens at the property. As such, the court finds that he does not have standing herein.

The Homeless Charity is an Ohio Corporation. Appellants' brief asserts that The Homeless Charity rents a portion of the building at 15 Broad Street. This assertion appears to be argued for the first time on appeal and no lease is attached to the documentation. However, weighing the issues presented it does appear that the charity itself has standing due to its reasonable assertion that it has a legal interest in the property.

The standing of the alleged individual members of The Homeless Charity is a more problematic issue. According to filings with the Ohio Secretary of State, the purpose of The Homeless Charity is to "help homeless people through raising money and other donations for the homeless community". There has been no showing or evidence presented to demonstrate that the Charity is a membership organization. Moreover, the affidavits submitted with the Briefs include several affidavits and documents demonstrate that as of June, 2018, The Homeless Charity had a Tri-Council charged with overseeing the management of the persons coming into contact with the Charity. Appellants Exhibit 4, Affidavit of Herman Wyatt with Exhibits; Exhibit 22, Affidavit of Mary Zettle; and Exhibit 23, Affidavit of Tony Putnam.

This evidence demonstrates that there is leadership in the corporation – not that it is a member organization that can assert claims on behalf of the non-parties. As it is not a membership association, The Homeless Charity cannot assert claims for non-parties based upon an abstract concern for their wellbeing. *Hunt v. Wash. State Apple Adv. Comm'n*, 432 US 333, 342 (1977). Without further evidence of the membership aspect of the corporation, the Homeless Charity lacks standing to assert claims for non-party homeless persons.

Thus, the court finds that Sage Lewis LLC and The Homeless Charity are the only appellants who have standing to assert claims relating to their organizational injury herein.

2. Res Judicata

The issues presented on appeal include constitutional arguments. This court has previously ordered that the only constitutional arguments that can be made in this case are whether the ordinances involved in the denial of the variance are unconstitutional as applied to the Appellants. Appellees argue that the dismissal of the prior appeal precludes Appellants from asserting any constitutional claims that could have been asserted in the original conditional use appeal. Because the zoning statute was at issue in the prior action, Appellees argue that an as applied challenge could have been asserted in the prior action as well, exploring the legislative judgment underlying the enactment of the zoning code, much as it will be in this case, and as such the issue is precluded by res judicata.

While the court can follow this reasoning to some level, the reality is that the arguments in this case have been very limited. The prior action did not address whether the variance ordinance is unconstitutional as applied to Appellants and any constitutional inquiry herein is limited to that issue. As such, the Court rejects this argument to the extent set forth herein.

B. ADMINISTRATIVE APPEAL

Homeless Charity et al. argue that the BZA failed to address the substance of the variance request and that the subsequent decision the BZA issued is not supported by a preponderance of substantial, reliable and probative evidence.

1. Standard of Review

In analyzing this appeal, this court is required "to examine the whole record, make factual and legal determinations, and reverse the board's decision if it is not supported by a preponderance of substantial, reliable, and probative evidence. *Cleveland Clinic Found. v. Cleveland Bd. of Zoning Appeals,* 141 Ohio St.3d 318, 324 (2014) (*citing Dudukovich v.*

Housing Authority, 58 Ohio St.2d 202, 207 (1979)). In this case, there does not appear to be a dispute about the propriety of the order to comply itself – the parties acknowledge that the order had not been fully followed when the order to comply was issued and by the date of the hearing the order to comply was no longer the issue. Rather, the main issue concerns the variance request.

The Ohio Supreme Court in *Consolidated Mgt., Inc v. Cleveland*, stated succinctly as follows:

> A variance is intended to permit amelioration of strict compliance of the zoning ordinance in individual cases. It is designed to afford protection and relief against unjust invasions of private property rights and to provide a flexible procedure for the protection of constitutional rights. *Nunamaker v. Bd. of Zoning Appeals* (1982), 2 Ohio St.3d 115, 443 N.E.2d 172; *In re Appeal of Clements* (1965), 2 Ohio App.2d 201, 207 N.E.2d 573 [31 O.O.2d 328]. Conversely, variances are not authorized to change zoning schemes or to correct errors of judgment in zoning laws. The authority to permit a variance does not include the authority to alter the character and use of a zoning district. *Schomaeker v. First Natl. Bank* (1981), 66 Ohio St.2d 304, 309, 421 N.E.2d 530 [20 O.O.3d 285]; *Fox v. Johnson* (1971), 28 Ohio App.2d 175, 275 N.E.2d 637 [57 O.O.2d 234]; see *8 McQuillin, Municipal Corporations* (3 Ed.1976) 476, Section 25.160.

6 Ohio St.3d 238, 240 (1983).

A "board's authorization (or denial in a given case) [of a variance] is presumed to be valid, and the burden of showing the claimed invalidity rests upon the party contesting the determination." *Id.* (*citing C. Miller Chevrolet v. Willoughby Hills*, 38 Ohio St.2d 298 (1974)). Thus, the Court is obliged to affirm the BZA decision absent evidence that the denial of the variance is "unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence." R.C 2506.04. Further, "[c]onsistent 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." *Id.*

Additionally, as succinctly stated by the Ninth District Court of Appeals in *Abdelqader Holdings v. Akron Bd. Of Zoning Appeals*, 2020-Ohio-1195, ¶ 12:

> "Zoning is a valid legislative function of a municipality's police powers." *Jaylin Invests., Inc. v. Moreland Hills,* 107 Ohio St.3d 339, 2006–Ohio–4, ¶ 10. "A zoning regulation is presumed to be constitutional unless determined by a court to be clearly arbitrary and unreasonable and without substantial relation to the public health, safety, morals, or general welfare of the community." *Goldberg Cos., Inc. v. Richmond Hts. City Council*, 81 Ohio St.3d 207 (1998), syllabus. "The burden of proof remains with the party challenging an ordinance's constitutionality, and the standard of proof remains 'beyond fair debate.' " Id. at 214. "[T]here is little difference between the 'beyond fair debate' standard and the 'beyond a reasonable doubt' standard." *Cent. Motors Corp. v. Pepper Pike*, 73 Ohio St.3d 581, 584 (1995).

In the present case, Akron City Ordinance (ACO) 153.404 governing variances indicates that the BZA may "vary the application of certain of the regulations established in the Zoning Code in harmony with their general purpose and intent." A variance "shall be authorized only when the Board finds adequate evidence that they will meet the criteria set forth in ACO 153.474 and ACO 153.476". *Id.* The BZA's jurisdiction to grant a variance is further limited to the specific instances noted in ACO 153.404 (A) to (X). It is within this context that the Court must determine whether to overturn the denial of the variance.

2. The Variance Request

Appellants submitted a 14-page typed document along with approximately 1500 pages of evidence intended to support the requested variance. Much of the 1500 pages of evidence contained items previously submitted to the City Council regarding the conditional use request. The "Appeal of Order to Comply" included the request for the variance. Therein, Appellants asserted they "do not anticipate the need for emergency shelter to result in as many tents as were used in the past." (Appeal, Page 5). They further asserted every effort would be made to house the individuals in need prior to allowing the use of tents. (Appeal, Page 6). Acknowledging that the BZA has the power to grant variances within their authority pursuant to ACO 153.404(I) Appellants assert that the variance is within the BZA authority and that the

use is not prohibited by the ACO. (Appeal, Page 7). Further, they argue that it is general keeping with and appropriate to the uses authorized in such district. (Id). Appellants, in arguing that the variance requested is compatible with the neighborhood point out that the homeless will be there at the day center anyway, having a variety of needs addressed, so sleeping there also doesn't alter their presence or create any additional impact. (Appeal, Page 8). Further, in addressing the requirements of ACO 153.474 and 153.476, Appellants argue that the potentially lifesaving shelter that would be provided would meet those requirements. (Appeal Pages 8-9). The detail of the variance request indicates that the tents would only be put up when needed, that they would use the same size and color of tents, they would be in a corner of the lot farthest from the apartment building next door, and on a hard surface. (Appeal, Page 9). Appellants further assert that they would enforce quiet time hours, that there would be an outhouse and washing station, and indoor bathrooms and showers would be available.

Regarding the factors in ACO 153.474, Appellants assert that the use of these tents is much better than the alternative for the homeless, and that this humane response to a difficult problem is in line with the bottom purpose of the comprehensive plan – to create a prosperous and harmonious society. They further assert that this use is not in conflict with the general vicinity as this zoned dwelling space is crunched between commercial real estate. (Appeal, Page 11). However, it is clear a great deal of the area around this lot is also residential (apartment buildings and indoor homeless community). Appellants assert then, that this is not a "picture book" residential community. (*Id.*) Appellants further argue that the sheltering of the homeless is not hazardous, there are adequate services and public infrastructure, and no added public cost or economic detriment to the area. (Appeal, Page 12). Appellants further assert that the rules will be strictly enforced as to restrict noise, smoke, fumes or odors. (Appeal, Page 13). At no place in the Appeal with variance request do they state the size or number of tents

requested, nor do they state that they would limit the number of tents to a certain number or limit the amount of time an individual would stay there. In this respect their request was vague.

The Planning Department, as required by ordinance, provided a Memorandum outlining its position on the requested variance. It bears noting here, as set forth by the Planning Department in its memo, during the first round of hearings and arguments regarding this property, the City Council and the Planning Commission denied a conditional use permit for the use of tents on the property. They relied upon the same ordinances that were before the BZA – 153.240(F), 153.474 and 153.476. The planning department submitted that the placement of multiple tents (campground) was not harmonious with the surrounding land use because the plan is to preserve and protect single-family residential neighborhoods, and the plan generally expects properties for single-family use will consist of a single, habitable, residential structure. The Planning Department further asserted that tents are not harmonious and appropriate in appearance with the existing or intended character of the general vicinity. Regarding the hazardous argument, the Planning Department rightly reflected on what happened before, and found that offensive conditions may arise making it hazardous or disturbing to neighboring uses. The Planning Department further opined that the BZA did not have the authority to grant the variance per ACO 153.404(I).

At the hearing, the Planning Department presented the arguments in their memo, Appellants were permitted to make argument and submit witnesses, other organizations and citizens were permitted to make their arguments in opposition to the variance, and the BZA members asked questions as they wished and discussed the matter on the record. At the conclusion of the hearing the BZA voted to deny the variance. Subsequently the Minutes of the Meeting were typed up and the BZA signed a typed Findings and Decision Following Hearing on Appeal of the Notice and Order to Comply. This appeal followed.

3. Analysis

Appellants begin their argument asserting that the single-family narrative asserted at the hearing was disingenuous at best. This Court disagrees.

There is no dispute that the area in which the tents are sought to be placed was indeed zoned as a U1 - dwelling zone. The issue of whether this property should be zoned U1 is not before the court. It is, in fact, a U1 district and the analysis herein must reflect that. As previously stated herein, variances are not permitted to change zoning schemes or to correct errors of judgment in zoning laws. *Schomaeker v. First Natl. Bank*, 66 Ohio St.2d 304, 309 (1981). The authority to permit a variance does not include the authority to alter the character and use of a zoning district. *Id*. The BZA did not have the authority to disregard the zoning designation of the property at issue and neither does the court. Members of the BZA noted as much at the hearing. *Appellants Exhibit 21* (Minutes of the Akron BZA Meeting of January 30, 2019, Pages 14-15).

Appellants further argue that the Planning Department misstated the number of tents sought. The evidence shows that Appellants were present at the hearing and were able to assert their position that a much smaller community was sought. Their written request for variance failed to state the number of tents sought. The site plan depicted 7 tents, but nowhere did the request for variance limit it to 7 or less. Moreover, the issue of whether the code specifically prevents a "campground" is not dispositive on the variance issue because ultimately the BZA must apply the circumstances of the requested variance within their allowed variance uses to determine whether the variance is permissible. In the instant case they found that it was not.

a. The BZA did not have authority to approve the erection of multiple tents in the U1 zoned lot

There was discussion during the hearing about whether the BZA had the authority to grant the requested variance. *Appellants Exhibit 21.* This Court finds that they did not. Wading through the various provisions within the Akron Codified ordinances leads to the

following analysis and conclusion on whether the 7 or so tents requested are permitted in the back lot of the property in question which is zoned a U1 dwelling district.

ACO 153.240 addresses the permissible uses of property in the U1 dwelling district. Applicable to the current requested use, the property is limited to single or two family dwellings (ACO 153.240 (A)(1) and (2)). The 15 Broad Street building itself is not located within the dwelling district, and the back lot that is in the U1 dwelling district currently has no building or structure constructed thereon. To have persons living in the back yard, an accessory structure would need to be built – a tent would constitute an accessory structure. **Only** one accessory structure **shall** be permitted on a lot. (ACO 153.240 (G)). **No** premises shall be used, or structure erected, to be used for more than one family. (ACO 153.240(F)).

These rules are prohibitory. The BZA may vary the zoning code regulations in harmony with the general purpose and intent. (ACO 153.404) However, the BZA's jurisdiction to grant a variance is limited to the instances enumerated in ACO 153.404(A) to (X). (*Id.*) ACO 153.404(I) indicates that a variance cannot be granted if the use is specifically prohibited. As outlined above, multiple accessory structures are prohibited, and multiple family use of one accessory structure is also prohibited.

Appellants argue that the whole point of the BZA is to grant variances from what is presently disallowed. This court finds that the BZA can modify a permitted use but cannot permit a prohibited use. The BZA may grant a variance to modify allowed uses or expand uses as outlined in 153.404 (A) to (X). Thus a building can be expanded or built closer to a property line, the property can be used for a nursing home, accessory parking can be created, the height can be modified, it can be built beyond the permitted building line, can be used for retail under certain circumstances, or for a daycare with specifications, etc. However, within all of those allowed uses, the BZA cannot allow for prohibited uses, such as those established in ACO 153.240, to create multiple accessory structures on the property, or permit multiple

families to reside in an added accessory structure. As such, the court finds that the BZA was without authority to grant the variance requested by the Appellants herein.

b. The Requested Variance Was Properly Denied

In addition to finding that the requested variance fits within the parameters of ACO 153.404, the variance must also comply with the requirements of ACO 153.474 and 153.476. Thus, assuming the BZA had the authority to allow the requested multiple tents, despite the prohibition of multiple structures, the BZA was reasonable in denying the variance. Assuming the tents are not a prohibited use, their use must still be "in general keeping with, and appropriate to, the uses authorized in such district." ACO 153.404 (I). Further, pursuant to the Akron Code, the Planning Department is required to prepare a recommendation, transmit that recommendation to the BZA, and appear and present that recommendation at the BZA hearing on the matter. (ACO 153.426). In the instant case, that is what happened. The planning staff are not required to issue a recommendation in a vacuum. Rather, they must consider all that has happened in a particular situation and report on all of the factors and circumstances supporting their recommendation.

Despite Appellants' arguments to the contrary, the property at issue is zoned residential. The BZA did not have the authority to rezone the property or ignore the parameters in which they must decide whether to grant the variance. They heard the arguments of the planning board and their recommendations to deny the variance and further heard the arguments of the Appellants in support of the variance and others in opposition.

The evidence supported a finding that the use was not harmonious with the City's comprehensive plan. ACO 153.474(A). The property, like it or not, is zoned residential and there are neighboring residential properties. The housing code sets forth requirements for places where people will live and the request to allow person to live in tents, is not harmonious with those standards or with the overall plan to preserve neighborhoods. Prior experiences with

individuals previously living in tents in the back lot of the property was properly considered in making a determination as to whether this particular land use would be harmonious.

Despite Appellants' arguments to the contrary, clearly tending to the homeless population during the day, and housing them in tents in the back lot at night are two very different things and could result in differing resultant issues. For these same reasons, the evidence supported a finding that the use of tents in the backyard at this property is not harmonious or appropriate with the existing and intended character of the neighborhood. ACO 153.474(B). The neighborhood certainly has a mixed use. However, persons who sleep there do so in enclosed structures with water, heat, etc. Moreover, fabric and brick are not harmonious to the overall look of the property. Certainly, Appellants assert that the tents would only be in the one corner of the property so no one would see it. This does not change the unharmonious nature of the tents.

Further, the evidence supported a finding that the proposed variance presented a risk of harm to the economic welfare of the community due to the potential reoccurring offensive conditions that previously existed regarding noise, trash, odor, and safety concern. Despite appellants' assertions that this would not happen again, the BZA was certainly within its rights to consider that these issues could exist again if the use was permitted. ACO 153.474(E). The evidence supported the conclusion that the proposed use was not in general keeping with the dwelling district uses.

Any one of these findings was fatal to the request for variance. Based upon all of the facts and circumstances, the BZA found that the use of tents on this property would be detrimental to the surrounding neighborhood, denied the appeal and denied the variance.

3. Conclusion

The Court hereby affirms the decision of the BZA upholding the Order to Comply and denying the request for a variance. As set forth herein, the BZA did not have the authority to

grant the requested variance and even if it did, the evidence supports their decision to deny said variance. The court finds that the BZA's decision was not illegal, arbitrary, capricious, or unreasonable, and that the decision was supported by the preponderance of substantial, reliable and probative evidence on the whole record. As such, the BZA decision is affirmed.

C. CONSTITUTIONAL CLAIMS

On January 15, 2020, this Court ordered discovery on the sole issue of the constitutionality of the variance statute as applied to Appellants. Thereafter, the Court ordered the parties to appear at an in person status conference to further discuss the timeline going forward. At the January 31, 2020 Status Conference the BZA asserted that they did not believe that the Appellants had articulated what constitutional rights they were asserting were violated, and further they did not believe there were legitimate claims that could be asserted by the Appellants in this matter. As a threshold issue, the Court ordered Appellants to set forth in their brief on the administrative appeal their constitutional claims in this matter so that the Court could evaluate whether there were in fact any cognizable claims to be argued. It was expected that Appellants would set forth their legal authority for the claims being made or at least argue how current rights could or should be extended to the current situation. These legal arguments were to precede any discovery.

1. Res Judicata and Parties

Appellants did not argue at the BZA hearing that the statutes or the Order to Comply were unconstitutional. They cannot then on appeal assert that argument for the first time. *Wymsylo v. Bartec, Inc*., 132 Ohio St.3d 167 (2012); *Cleveland Gear Co. v. Limbach*, 35 Ohio St 3d 229 (1988); *Reading v. Pub. Util. Comm*., 109 Ohio St.3d 193 (2006); *King v. Ohio Dept. of Job & Family Servs.*, 9th Dist., 2019-Ohio-2989 (Jul. 24, 2019). "[P]arties advancing an as-applied challenge must raise that challenge at the first available opportunity and failure to do so results in waiver." *Wymsylo* at 173. Thus, as previously ordered, the constitutional claims

asserted in this matter are limited to the constitutionality of the denial of the variance and the variance statutes as applied to Appellants at that time.

Additionally, as set forth above, The Homeless Charity is not a member organization and cannot assert the rights of non-parties in this matter. In their March 31, 2020 brief, Appellants asserted five rights of which three applied to homeless non-parties. The court is without authority to rule on those alleged rights. Finally, this section will similarly not consider claims asserted by Sage Lewis as he relinquished his rights to the property by placing it in an LLC.

2. Asserted Constitutional Violations

This leaves for this Court's consideration the articulated rights in the March 31, 2020 brief asserting claims under Article 1, Section 16 of the Ohio Constitution - Due Course of Law and the Fourteenth Amendment substantive due process claims. Additionally, this Court will consider, as asserted in their Reply Brief filed July 17, 2020, their articulated deprivation of their right to use their property interest to rescue others, their liberty interest to rescue the homeless, and their substantive due process right to rescue others.

3. Analysis

a. Alleged Deprivation of Property Rights

Article 1, Section 1 of the Ohio Constitution states: "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety." Further Article 1, Section 16 of the Ohio Constitution states as follows: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

"Property interests are distinguished from life or liberty interests because property interests are founded on the procedural aspects of due process; they are not substantive rights created by the federal Constitution." *1946 St. Clair Corp. v. Cleveland*, 49 Ohio St.3d 33, 36 (1990). Property interests " . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regent of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). As such, constitutional analysis when dealing with property rights is limited to procedural due process.

The procedural component of the due process clause does not protect everything that may be considered as a benefit. Rather, "an individual must have more than 'an abstract need or desire for it' or a 'unilateral expectation if it.' He must, instead, 'have a legitimate claim of entitlement to it.' " *State ex rel. Trimble v. State Bd. of Cosmetology*, 50 Ohio St.2d 283, 285, 364 N.E.2d 247 (1977) (quoting *Bd. Of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701 (1972). "To establish a procedural due process violation, it must be shown that the conduct complained of deprived the plaintiff of a liberty or property interest without adequate procedural safeguards." *Roe v. Franklin Cty.*, 109 Ohio App.3d 772, 779, 673 N.E.2d 172 (10th Dist.1996) (citing *Roth* at 569).

Appellants Sage Lewis LLC and The Homeless Charity argue they have the right to possess and protect their property. They assert that the BZA has deprived them of the use of their property through active enforcement of the zoning code. They further allege their right to "put the property to the beneficial use of sheltering the homeless in desperate peril." (Appellants' Reply Brief, Page 23). They summarize this argument by citing two United States Supreme Court cases that address procedural due process claims. Clearly, Appellants were notified that they were not permitted to use the property for a multiple tent community and

further they have had numerous hearings on this exact issue so there is no argument that their procedural rights were affected.

As discussed in more detail above, whether a variance is granted is discretionary and there is no unreserved right to a variance. As such, there can be no property interest in the variance under Akron and Ohio law. *EJS Props. LLC v. Toledo*, 698 F.3d 845, 855-56 (6th Cir. 2012)

Moreover, in *Goldberg Cos. Inc. v Richland Heights City Council*, 81 Ohio St.3d 207 (1998), the Ohio Supreme Court analyzed whether regulations regarding parking spaces constituted a deprivation of the use of the property. Therein they held that "[a] municipality or other zoning body is justified by its police powers to enact zoning for the public welfare and safety. The powers, not unlimited, need only bear a rational relation to the health, safety, morals or general welfare." *Id.* at 213-214 (citing *Euclid v. Ambler*, 272 U.S. 365 (1926)). The Court then proceeded to "hold that a zoning regulation is presumed to be constitutional unless determined by a court to be clearly arbitrary and unreasonable and without substantial relation to the public health, safety, morals, or general welfare of the community." *Goldberg* at 214.

Similarly, the Ohio Supreme Court has applied a standard similar to a federal substantive-due-process challenge in *Jaylin Invest., Inc. v. Moreland Hills*, 107 Ohio St.3d 339, 2006-Ohio-4. In that case, the court held that zoning is a "valid legislative function of a municipality's police powers," and that "courts should not interfere with zoning decisions unless the municipality exercised its power in an arbitrary and unreasonable manner and the decision has no substantial relation to the public health, safety, morals, or general welfare." *Id.* at ¶ 10 (citing *Ambler* at 395). In the instant case, the BZA has not precluded any use of the property; they simply denied a request to have multiple tents on the lot. To regulate how many structures can be placed on property is not arbitrary or unreasonable and, as applied, it was reasonable to deny the use requested. The evidence already in the record and articulated herein

substantiated the relation to public health and safety, and to the general welfare of the community. Moreover, the decision did not preclude them from building one structure to house the homeless, and the ordinances at issue do not preclude Appellants from housing the homeless within the building.

As such, based upon the voluminous record that exists herein, this Court finds that, as applied to Appellants, the ordinances regarding the denial of the variance are constitutional in terms of any alleged deprivation of property, and further that Appellants received all of the procedural due process rights to notice and an opportunity to be heard.

b. Alleged Deprivation of Life and Liberty Interests to Rescue

Appellants additionally assert a constitutional right and interest to rescue the homeless. They readily acknowledge that this is a case of first impression on this alleged right or interest. However, they allege that the facts of this case are similar to other cases that recognized a right to rescue individuals in peril.

In *Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990), the plaintiff was the mother of a child who drowned. The Court found that the County had a policy preventing private citizens from rescuing drowning victims. In that case they found the policy violated the **mother's civil rights** by using state power to prevent the rescue of her son and as such her Section 1983 claim should be reinstated. The court therein specifically found that "plaintiff has sufficiently alleged that the county arbitrarily **denied William his fourteenth amendment right to life.**" This finding is a far cry from a right to rescue. Rather it focused on the decedent's right to live.

Similarly, in *Beck v Haik*, 6th Cir. No. 99-1050, 2000 WL 1597942 (Oct. 17, 2000) the plaintiffs were again the family of a drowning victim where private persons were forbidden from diving to save the person drowning. In that case, application of the policy prohibiting the volunteer divers from attempting a rescue was alleged to constitute a violation of the Due Process Clause of the Fourteenth Amendment. The Sixth Circuit opined that "public safety

officials should have broad authority to decide when civilian participation in rescue efforts is unwarranted. If police officials are not satisfied that would-be rescuers are equipped to make a viable rescue attempt, for instance, it would certainly be permissible to forbid such an attempt. It would not be irrational, similarly, to prohibit private rescue efforts when a meaningful state-sponsored alternative is available." However, the Sixth Circuit court felt constrained to follow the *Ross* precedent and found that "Ross holds that official action preventing rescue attempts by a volunteer civilian diver can be arbitrary in a constitutional sense if a state-sponsored alternative is not available when it counts." Applying this to the facts of our case, again the focus is on whether the decedent's rights were violated.

Appellants have asserted that the rights run together – right to be rescued equals right to rescue – when people want them to run together. The case at bar, however, is not a situation where Appellants were precluded from helping the homeless – rather they were forbidden from putting up tents in their dwelling district lot pursuant to zoning restrictions. Based upon the legal arguments presented by the Appellants, this court cannot find that Appellants have a constitutional liberty right to rescue the homeless. As such, discovery need not proceed on this issue.

d. Conclusion

Based upon the foregoing, this Court finds that Appellants have failed to assert constitutional rights that warrant further discovery in this case. As applied, the Akron ordinances do not violate Appellants' constitutional rights and these claims are herein dismissed.

III. CONCLUSION

The Court is not unsympathetic to the plight of the homeless in Akron, and acknowledges the efforts of the Plaintiff-Appellants in seeking a solution. However, the

proposed solution in this instance is prohibited by laws that were put in place for the greater harmony of the City—laws that were reasonably enforced by the Board of Zoning Appeals.

While the BZA can modify a permitted use, it cannot permit a prohibited use. The back lot to 15 Broad Street is zoned as U1 dwelling district, where multiple accessory structures are prohibited, and multiple family use of one accessory structure is also prohibited. Therefore, the BZA properly denied the variance request. The Plaintiff-Appellants have further failed to adequately articulate constitutional violations for this Court to permit discovery to proceed. For these reasons, as fully set forth herein, Plaintiff-Appellants' appeal is denied and the matter is hereby dismissed.

Costs are taxed to Appellant.

This is a final appealable order. There is no just cause for delay.

IT IS SO ORDERED.

JUDGE SUSAN BAKER ROSS

CC: ATTORNEY REBECCA J. SREMACK
ATTORNEY JEFFREY ROWES
ATTORNEY DIANA K. SIMPSON
ATTORNEY PAUL W. FLOWERS
ATTORNEY BRIAN D. BREMER
ATTORNEY LOUIS E. GRUBE
ATTORNEY JOHN R. YORK

SBR/CNT