IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

CALVARY BAPTIST CHURCH,
a West Virginia religious organization,

Petitioner,

v.

CIVIL ACTION NO. 17-C-41
JUDGE SUSAN B. TUCKER

CITY OF MORGANTOWN,
a West Virginia municipal corporation,

Respondent.

AMENDED ORDER

This matter came before the Court on August 16, 2018, for a scheduled and duly noticed bench trial. The Petitioner appeared in person with its counsel, Joseph V. Schaeffer and James A. Walls of Spilman Thomas & Battle, PLLC. The Respondent appeared in person and with its counsel, Ryan Simonton. The Court allowed the parties to proceed with presenting evidence and testimony.

Having considered the evidence presented at trial, the arguments of the parties, and a review of the record in this matter in light of the relevant statutory and case law, the Court hereby makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

This matter involves zoning classifications of Tax Map 55, Parcel Number 33, and with a mailing address of 519 Burroughs St., Morgantown, West Virginia, 26505 ("Parcel 33"). Calvary Baptist Church ("Calvary" or "Petitioner") has improved the majority of the parcel with a church

and adjoining parking lot. The remaining portion of the parcel, a 80-foot strip of property[1], ("Subdivided Parcel") is unimproved. The City of Morgantown ("City" or "Respondent") has imposed an R-1 single-family classification against the remaining Subdivided Parcel.

The Petitioner first presented Bernard Bossio as a witness. Mr. Bossio testified about the makeup of the neighborhood and the difficulty the R-1 classification poses given the area in which the Subdivided Parcel is located. Further, he averred that the current contract in place for the land is contingent upon the property being re-zoned to a B-2 classification.

The Petitioner then called Douglas Wise. Mr. Wise was qualified as an expert and testified that the value of Subdivided Parcel under R-1 classification is approximately $120,000.00 while the value under a B-2 classification is approximately $268,000.00.

Next, Petitioner called Christopher Fletcher. Mr. Fletcher testified as Director of Development Services for the City and explained the zoning classifications and conforming uses. Specifically, Mr. Fletcher stated that every parcel has a zoning classification and the classification dictates what property owners can and cannot do with the property. Further, if the property owner wants to do something contrary to the property's classification, he or she must request permission from the City. In such a situation, the owner may submit an application for zoning amendments. According to Mr. Fletcher, "[z]oning map amendment requests should be evaluated on their land use merits alone." *See* Fletcher Testimony: 79:8-9.

After an application is submitted, the City prepares a "Staff Report" based on the land use merits of the particular property. Mr. Fletcher testified that the City also considers "[t]he Comprehensive Plan, the physical character of the site in relation to its surrounding natural environment . . . [w]e may have a certain zoning classification on the property next to it or behind,

[1] In the Order issued on November 21, 2018 ("previous Order"), the Court erroneously reffered to the 60-foot strip of property.

that might be something different. And that would be taken into consideration . . . Compatibility uses that would be permitted within a zoning district, compared to what may be permitted next door. Traffic management, potential driveway entrances, their location as far as potential sightlines, safety, traffic, volumes . . . There's a lot of things to go into." *See* Fletcher Testimony: 81:5-82:1. Fletcher explained that the Planning Commission then makes a recommendation to City Council to either approve or deny the applicant's request based on the Staff Report, applicant's presentation, and a public hearing. Ultimately, City Council has the final decision on a zoning map amendment application.

After generally explaining the procedural process, Mr. Fletcher spoke about the Subdivided Parcel in question and surrounding area. Mr. Fletcher agreed with Calvary that in the 2003 Staff Report regarding the 60-foot parcel located adjacent to the Subdivided Parcel, the City said it was not "likely to ever be used for single family residential purposes, especially the portion fronting Burroughs."[2] *See* Fletcher Testimony: 61:14-16; 169:18-24. In January 2010, the Planning Commission recommended to City Council that a parcel directly across the street from the Subdivided Parcel, a parcel owned by the Wine Bar, be re-zoned from R-1 to PRO—Professional. Residential, and Office District, often used as a buffer district between commercial and residential districts—because "there have been major economic, physical, and social changes to the degree of substantially altering the basic characteristics of the subject area to the extent that a zoning reclassification is justified."[3] *See* Fletcher Testimony: 76: 16-20. A year later, an application requesting a change from PRO to B-2 for the Wine Bar parcel[4] was approved based on the Planning Commission's recommendation that the request should be evaluated on "their

[2] The Court finds it necessary to clarify which parcel the 2003 Staff Report discussed.
[3] In the previous Order, the Court erroneously referenced the location and owner of the parcel.
[4] In the previous Order, the Court erroneously referenced the Biafora parcel.

land-use merits alone" and weighing "all possible future development and land use scenarios as permitted." *See* Fletcher Testimony: 79: 8-9; 79:14-16.

Calvary has applied to the City twice to re-zone the Subdivided Parcel from R-1 to B-2. In July 2016, Calvary submitted its first request. In the August 2016 Staff Report, the Planning Commission did not make a recommendation and the City did not approve the application. However, on March 8, 2018, the Planning Commission issued another Staff Report concerning Calvary's second application. This report was drastically different from the 2016 report and concluded with a recommendation that the City deny Calvary's request.

Mr. Fletcher testified that during the sixteen to seventeen month period between the two Staff Reports regarding the Subdivided Parcel[5], there were no new developments in the area, no new traffic patterns, and no changes to the use of surrounding properties. Despite this, the Planning Commission issued a recommendation saying that circumstances were "quite different." To explain this, Mr. Fletcher first opined that the surrounding development had changed with the addition of thirty-three new residential dwelling units in the surrounding area. Second, he testified that there has been new construction and there is a community preference to protect and preserve the need for and value of single-family homes. But, the Planning Commission was not advised of the appraisal Mr. Wise submitted because Mr. Fletcher did not think it was relevant. Third, Mr. Fletcher cited traffic counts and said that the volume trends do not constitute a major change. Mr. Fletcher indicated that the Planning Commission did not evaluate traffic patterns for other streets because it was not necessary. Prior to concluding, Mr. Fletcher posited that although the City adopted a new Comprehensive Plan since the City re-zoned the Wine Bar parcel, located

[5] The Court finds it necessary to clarify which parcel the Staff Reports discussed.

across the street from the Subdivided Parcel,[6] the Comprehensive Plan is not law, nor is it binding; "[i]t's a series of principles." *See* Fletcher Testimony: 170:4-7.

Petitioner's final witness was David Harkins. Mr. Harkins testified in his capacity as a trustee, and now deacon of Calvary. He stated that without the re-zoning, Calvary will not be able to obtain the necessary financial resources to complete the church.

Respondent did not call any witnesses.

Based on the foregoing, Petitioner requests the Subdivided Parcel be re-zoned from R-1 to B-2 classification.

Discussion

The Petitioner argues that the R-1 zoning classification is arbitrary and unreasonable and not related to a legitimate government interest. Further, Petitioner sets forth three negative issues regarding the R-1 classification: (1) location, (2) neighbors, and (3) typography. Regarding location, Petitioner submits that the Subdivided Parcel is unattractive and unsuitable for residential development. Additionally, given the neighbors, residential development would be difficult and not a harmonious use of the land. Finally, there are privacy issues because of car headlights shining into the property. Additionally, the west side of the Subdivided Parcel has a farily steep slope that according to Mr. Fletcher goes down at a right to left angle or East to West. *See* Fletheer Testimony: 84:23-24. Therefore, the typography makes residential development challenging and expensive. This Court agrees.

Under State and Federal constitutional protections, zoning classifications are permissible only to the extent their restrictions "are not arbitrary or unreasonable and bear a substantial relation to the public health, safety, morals, or the general welfare of the municipality." *See* Syl.

[6] In the previous Order, the Court referenced the wrong owner and location of the parcel.

Pt. 7, *Carter v. City of Bluefield*, 132 W. Va. 881, 54 S.E.2d 747 (1949); *see also Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

Furthermore, the Supreme Court of Appeals of West Virginia has held that to determine whether a zoning ordinance is invalid, the Court may consider "(1) existing uses and zoning of nearby property; (2) the extent to which property values are diminished by the particular zoning restrictions; (3) the extent to which the destruction of property values of the plaintiffs promotes the health, safety, morals or general welfare of the public; (4) the relative gain to the public, as compared to the hardship imposed upon the individual property owner; (5) the suitability of the subject property for the zoned purposes; and (6) the length of time the property has been vacant as zoned, considered in the context of land development in the area in the vicinity of the property." *See Par Mar v. City of Parkersburg*, 183 W. Va. 706, 710, 398 S.E.2d 532, 536 (1990).

It is clear and undisputed from the evidence that properties nearby and adjacent to Calvary are already being used for commercial, multi-family, or other non-single family residential purposes. Moreover, this Court finds that the City's arbitrary and capricious enforcement of its R-1 single-family zoning classification deprives Calvary of economically beneficial use of its property. It is also evident that if the R-1 classification remains, the current contract in place regarding the Subdivided Parcel will fail because the property is not suitable for R-1 zoning. Further, it is not likely that any residence will be built on the property in the future because the privacy and topography issues will remain.

Moreover, this Court finds that the City contributed to the current zoning predicament by re-zoning the 60-foot parcel adjacent to the Subdivided Parcel. This is further supported by the fact that the Wine Bar,[7] which is across the street from the Subdivided Parcel, was re-zoned from

[7] In the previous Order, the Court erroneously referred to the Biafora parcel.

R-1 to B-2 classification because the City determined there were "major economic, physical, and social changes to the degree of substantially altering the basic characteristics of the subject area to the extent that a zoning reclassification is justified" because there was no possibility of it being used for residential purposes. It is of note that the re-zoned Biafora parcel is contiguous to Calvary's Subdivided Parcel, yet the City declines to grant Calvary the same consideration it previously granted to the 60-foot Biafora parcel and to the Wine Bar parcel.[8] It is also obvious from Mr. Fletcher's testimony and by comparing the 2016 Staff Report to the 2018 Staff Report that the City has looked for reasons to deny Calvary's application for B-2 zoning and interfere with the current neighborhood scheme. The City's reasons are not only disingenuous, they are obviously arbitrarily and capriciously selected at best, if not utterly misleading and manufactured to justify the denial of Calvary's re-zoning request.

The City bases its decision in whole or in part on the fact that since granting the change for an adjacent parcel, the City has adopted a new Comprehensive Plan. However, by the City's own testimony and admission, the Comprehensive Plan is not law, nor is it binding. The Court is at a loss as to why the City would go to such lengths to deny Calvary's two re-zoning requests. Although no explanation was given nor requested, it is clear to this Court from the totality of the evidence that the City was determined to deny the requests both times and relied on arbitrary and capricious reasons to accomplish its desired outcome.

Based on the foregoing, this Court **ORDERS** as follows:

1. The City's enforcement of its R-1 single-family zoning class is unconstitutional.

2. The City must cure the Constitutional violation by amending the zoning

[8] The Court finds it necessary to clarify which parcels it is referencing.

classification of the Subdivided Parcel from R-1 to B-2.

The Clerk of this Court shall mail certified copies of this Order to all counsel of record.

ENTER: November 26, 2018.

Susan B. Tucker

SUSAN B. TUCKER, CHIEF JUDGE

ENTERED: NOV 26, 2018

DOCKET LINE 103 Jean Friend, Clerk

STATE OF WEST VIRGINIA, SS:

I, Jean Friend, Clerk of the Circuit/Family Court of Monongalia County State aforesaid do hereby certify the attached ORDER is a true copy of the original Order made and entered by said Court.

Jean Friend Circuit Clerk