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IN THE
COURT OF APPEALS OF INDIANA

BUCKHEAD REALTY, LLC, and ROCKY'S REALTY, LLC,	)	
Appellants-Petitioners,	)	
vs.	)	No. 10A01-0901-CV-8
JEFFERSONVILLE BOARD OF ZONING APPEALS, MHI HOSPITALITY CORPORATION and LOUISVILLE HOTEL ASSOCIATES, LLC,	)	
Appellees-Respondents.	)	

APPEAL FROM THE CLARK CIRCUIT COURT
The Honorable Abe Navarro, Judge
Cause No. 10C01-0803-PL-240

August 6, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellants-Petitioners, Buckhead Realty, LLC (Buckhead) and Rocky's Realty, LLC (Rocky's), appeal the trial court's Order denying their Verified Petition for Review by Certiorari of the Grant of a Development Standards Variance in favor of Appellees-Respondents, MHI Hospitality Corporation (MHI); Louisville Hotel Associates, LLC (LHA); and the Jeffersonville Board of Zoning Appeals (BZA).

We affirm.

ISSUE

Although Buckhead and Rocky's raise several issues on appeal mainly concerning the sufficiency of the evidence supporting the BZA's decision, we find the issue raised on cross-appeal by MHI and LHA to be dispositive of the matter before us and restate this issue as: Whether Buckhead and Rocky's have standing to challenge the BZA's approval of the developmental standards variance.

FACTS AND PROCEDURAL HISTORY

In June of 2000, Buckhead acquired certain real estate located at 707 West Riverside Drive, along the Jeffersonville Riverfront, in Jeffersonville, Indiana. Buckhead now operates the Buckhead Mountain Grill with appurtenant parking facilities at this location. During the same time, Rocky's acquired real estate adjacent to the Buckhead property and opened Rocky's Italian Grill with appurtenant parking facilities on its property.

In September of 2006, LHA purchased certain real estate located across the street from the Buckhead and Rocky's properties.[1] This real estate consisted of an existing multi-story hotel with appurtenant parking facilities to the north of the floodwall and a commercial building housing Ernesto's, a Mexican restaurant, Hooters, and meeting or storage space with parking facilities to the south of the floodwall.

On or about October 10, 2007, a new Bristol Bar & Grille restaurant opened in the space previously occupied by Ernesto's. Thereafter, on November 8, 2007, MHI filed an application with the BZA for a development standards variance from the parking requirements enacted in Article VII of the City of Jeffersonville Zoning Ordinance in anticipation of opening a third restaurant, a Bearno's Little Sicily Pizza restaurant, on its property. The Bearno's would have an anticipated seating capacity of 210 patrons and have up to 10 employees per shift.

On November 27, 2007, the BZA heard MHI's application during its regular meeting. At this hearing, MHI's counsel and its chief operating officer testified. During the course of the testimony, MHI offered into the record a copy of an agreement with the City of Jeffersonville to use 70 spaces of off-site and off-street parking located no more than 600 feet from its property. Jeffersonville's planning director acknowledged that MHI was accordingly in compliance with the City's zoning ordinance. In addition, MHI indicated that it had plans to move employee parking for all its restaurants to the newly leased 70 spaces which could reduce any perceived parking congestion on the street, add lighting to the new

[1] It should be clarified that MHI is the controlling entity of the LHA while LHA is the fee simple owner of the property.

parking lot and possibly add an emergency call box at the lot. After hearing the evidence, the BZA unanimously approved MHI's request for a development standards variance. Buckhead and Rocky's did not attend the hearing.

On December 12, 2007, Buckhead and Rocky's filed their Verified Petition for Review by Certiorari of the Grant of a Developments Standards Variance alleging, in pertinent part, that the variance is injurious to public health and safety and would adversely affect the value of their property, given the limited parking facilities in the area. On October 10, 2008, the trial court heard argument by the parties. Later that same month, on October 27, 2008, the trial court issued an Order affirming the BZA's grant of the development standards variance. On November 18, 2008, Buckhead and Rocky's filed a motion to correct error. On December 30, 2008, after a hearing, the trial court denied the motion to correct error.

Buckhead and Rocky's now appeal. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Although Buckhead and Rocky's raised several issues on appeal, we nevertheless find the cross-appeal raised by MHI and LHA determinative of the matter before us. Specifically, MHI and LHA contend that Buckhead and Rocky's do not have standing to challenge the BZA's grant of a developmental standards variance because they were not aggrieved by the BZA's decision.

A court reviewing an agency action may provide relief only if the action is: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2)

contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or shirt of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence. *Equicor Dev., Inc. v. Westfield-Washington Twp. Plan Comm'n*, 758 N.E.2d 34, 36 (Ind. 2001). In reviewing an administrative decision, we do not try the facts *de novo* or substitute our own judgment for that of the agency. *Id*. at 37. "This statutory standard mirrors the standard long followed by this [c]ourt" *Id*.

In order to have standing to seek judicial review of a BZA's decision, a person must be "aggrieved." Ind. Code § 36-7-4-1003(a). To be aggrieved, the petitioner must experience a substantial grievance, a denial of some personal or property right or the imposition . . . of a burden or obligation. *Bagnall v. Town of Beverly Shores*, 726 N.E.2d 782, 786 (Ind. 2000); s*ee also Union Township Residents Ass'n v. Whitley County Redevelopment Comm'n*, 536 N.E.2d 1044, 1045 (Ind. Ct. App. 1989). The BZA's decision must infringe upon a legal right of the petitioner that will be enlarged or diminished by the result of the appeal and the petitioner's resulting injury must be pecuniary in nature. *Id*. A party seeking to petition for certiorari on behalf of a community must show some special injury other than that sustained by the community as a whole. *Id*. MHI and LHA now assert that there is no evidence in the record that the BZA's decision caused Buckhead and Rocky's any pecuniary injury.

In *Sexton v. Jackson County Bd. of Zoning Appeals*, 884 N.E.2d 889, 893 (Ind. Ct. App. 2008), a township assessor testified that surrounding property values would decline if

the BZA approved a variance to allow the construction of a concentrated animal feeding operating. We found that this was sufficient to show that appellants suffered a pecuniary loss and thus to confer standing. *Id*. at 894.

Here, there is no evidence that Buckhead and Rocky's would suffer any monetary loss by the granting of the developmental standards variance. Although Buckhead and Rocky's generally aver that "numerous customers of the Hooter's restaurant and the former Ernesto's restaurant on the LHA Restaurant Property have historically utilized the existing parking on the Buckhead Property and the Rocky's Property without the consent of Buckhead or Rocky's," they failed to assert how this harmed them monetarily. (Appellants' App. p. 13). Besides the mere statement that LHA's patrons used their parking facilities, they provide no evidence that they lost any business because of this parking problem or how the grant of the parking variance might affect its property values. In the absence of any evidence of pecuniary loss, we cannot conclude that Buckhead and Rocky's have standing to bring the instant cause. As a result, we affirm the trial court's Order.

CONCLUSION

Based on the foregoing, we hold that trial court properly affirmed the BZA's grant of a developmental standards variance as Buckhead and Rocky's did not have standing to challenge the BZA's decision.

Affirmed.[2]

KIRSCH, J., and MATHIAS, J., concur.

[2] Appellants' Motion To Set Oral Argument is hereby denied.