

App. 1

**The Supreme Court of Ohio**

---

**CASE ANNOUNCEMENTS**

**September 13, 2022**

\* \* \*

**APPEALS NOT ACCEPTED FOR REVIEW**

\* \* \*

**2022-0790. Homeless Charity v. Akron Bd. of  
Zoning Appeals.**

Summit App. No. 30075, 2022-Ohio-1578.

\* \* \*

---

App. 2

STATE OF OHIO ) IN THE COURT OF  
 ) ss: APPEALS NINTH  
COUNTY OF SUMMIT ) JUDICIAL DISTRICT

HOMELESS CHARITY, et al. Appellants v. AKRON BOARD OF ZONING APPEALS Appellee	C.A. No. 30075 APPEAL FROM JUDG- MENT ENTERED IN THE COURT OF COM- MON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV-2019-02-0684
---	---

DECISION AND JOURNAL ENTRY

Dated: May 11, 2022

---

CALLAHAN, Judge.

{¶1} Appellants, The Homeless Charity, Sage Lewis LLC, and Sage Lewis, appeal an order of the Summit County Court of Common Pleas that affirmed the denial of a use variance by the Akron Board of Zoning Appeals. This Court affirms.

I.

{¶2} On September 17, 2018, Akron City Council denied a conditional use permit sought by The Homeless Charity, Sage Lewis LLC, and Sage Lewis to allow a “campground/tent community” for the homeless at 15

App. 3

Broad Street, a property owned by Sage Lewis LLC.<sup>1</sup> At the same time, the city created an “action plan” involving Mr. Lewis, The Homeless Charity, and Continuum of Care to provide for the transition of those who had been living in the tent community to alternative housing. On December 6, 2018, however, the city issued a “Notice of Violation/Order to Comply” to Mr. Lewis and Sage Lewis LLC, alleging a violation Section 153.240(F) of the Akron Zoning Code because tents remained on the property, and because “[t]he operation of a campground is not permitted in a residential use district.”

{¶3} On December 21, 2018, The Homeless Charity, Sage Lewis LLC, and Mr. Lewis appealed to the Board of Zoning Appeals (“BZA”). In so doing, they represented that they would comply with the December 6, 2018, notice because those who had been living in tents were obtaining other housing. Nonetheless, they also noted that they “appeal[ed] the [notice] so that they may provide tents on private property as emergency, potentially life-saving shelter to the most destitute members of the community[.]” and sought a variance “to allow them to use tents when [their] own indoor housing options, combined with options from other providers, prove insufficient and the only realistic alternative for a person in immediate need is the

---

<sup>1</sup> The Summit County Court of Common Pleas dismissed a subsequent administrative appeal, concluding that it lacked jurisdiction because the appeal was not properly perfected. This Court affirmed. *See generally The Homeless Charity v. Akron*, 9th Dist. Summit No. 29334, 2019-Ohio-5330.

#### App. 4

streets.” They characterized the collaboration with the city and the Continuum of Care that resulted from the earlier proceedings as “a great success” but also noted that it “provide[d] the context for the variance [they] now seek” and stated that the variance “differ[ed] in certain material respects from the conditional-use application.” Specifically, The Homeless Charity, Sage Lewis LLC, and Mr. Lewis represented that they requested a variance to permit fewer tents for a specific and limited purpose: “emergency, potentially lifesaving shelter (in the absence of other options)[.]”

{¶4} A proposed site plan submitted in support of the appeal and request for a variance illustrated their proposal with seven tents located in a triangular area formed by the southeastern property boundary and an existing structure containing bathrooms, laundry facilities, and a handwashing station. In support of their appeal and request for a variance, The Homeless Charity, Sage Lewis LLC, and Mr. Lewis argued that “[t]he use of tents as temporary, potentially lifesaving shelter is not specifically prohibited[.]” and, consequently, that the BZA had the authority to grant the variance under Section 153.404(I) of the Akron Zoning Code.

{¶5} The BZA conducted a public hearing on the appeal and request for a variance on January 30, 2019. The Akron City Planning Commission opposed the request for a variance, arguing that because a “campground” was a prohibited use, the BZA did not have the authority to grant a use variance. In the alternative, the Planning Commission maintained that

the variance did not meet the requirements for granting a variance under the zoning code. At the conclusion of the hearing, the BZA denied the request for a variance.

{¶6} On February 21, 2019, The Homeless Charity, Sage Lewis LLC, and Mr. Lewis filed an administrative appeal to the Summit County Court of Common Pleas. They moved to allow additional evidence and permit discovery, citing R.C. 2506.03 and arguing that the administrative record was insufficient to permit them to develop arguments that the zoning code was unconstitutional as applied. The BZA opposed the motion arguing, in part, that R.C. 2506.03 does not contemplate supplementation of the record in order for an appellant to develop constitutional arguments on appeal. On January 15, 2020, the trial court granted the motion to conduct discovery and supplement the record solely with respect to the constitutional arguments, rejecting the city’s position that those arguments should have been raised before the BZA for the purpose of developing the record. Nine days later, however, the parties filed a joint notice that they agreed to stay discovery “[p]ursuant to the discussion from the January 15, 2020 teleconference \* \* \* until certain legal issues are resolved.”

{¶7} The parties subsequently filed their respective briefs. On July 14, 2021, the trial court affirmed the decision of the BZA with respect to the variance. The trial court also concluded that only Sage Lewis LLC had standing to assert constitutional challenges and rejected the remaining constitutional challenges

asserted. The Homeless Charity, Sage Lewis LLC, and Mr. Lewis appealed, raising three assignments of error that are rearranged for purposes of disposition.

II.

**ASSIGNMENT OF ERROR NO. 2**

**THE TRIAL COURT ERRED IN UPHOLDING THE VARIANCE DENIAL.**

{¶8} In their second assignment of error, The Homeless Charity, Sage Lewis LLC, and Mr. Lewis have argued that the trial court erred by upholding the BZA’s denial of their variance request. This Court does not agree.

{¶9} Under R.C. 2506.04, a trial court considering an administrative appeal reviews the order at issue to determine whether it is “unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record.” “R.C. Chapter 2506 confers on the common pleas courts the power 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, 2014-Ohio-4809, ¶ 24, citing *Dudukovich v. Lorain Metro. Hous. Auth.*, 58 Ohio St.2d 202, 207 (1979). The scope of this Court’s review of the trial court decision, however, is “narrower and more deferential”:

App. 7

[T]he standard of review for courts of appeals in administrative appeals is designed to strongly favor affirmance. It permits reversal only when the common pleas court errs in its application or interpretation of the law or its decision is unsupported by a preponderance of the evidence as a matter of law.

*Cleveland Clinic Found.* at ¶ 25, 30. When reviewing a trial court’s decision in an administrative appeal, this Court must determine whether, as a matter of law, the trial court’s decision is unsupported by a preponderance of reliable, probative, and substantial evidence. *Independence v. Office of the Cuyahoga Cty. Executive*, 142 Ohio St.3d 125, 2014-Ohio-4650, ¶ 14, citing *Kisil v. Sandusky*, 12 Ohio St.3d 30, 34 (1984). *See also Cleveland Clinic Found.* at ¶ 25 (“The courts of appeals may review the judgments of the common pleas courts only on questions of law; they do not have the same power to weigh the evidence.”).

{¶10} Section 153.404 of the Akron Zoning Code<sup>2</sup> describes the BZA’s jurisdiction with respect to variances:

The Board of Zoning Appeals may, on appeal in a specific case, after public notice and hearing, vary the application of certain of the regulations established in this Zoning Code in harmony with their general purpose and intent. These variances shall be authorized only

---

<sup>2</sup> The Akron Zoning Code underwent significant revision between 2018 and the present. This opinion refers to the version in effect when the proceedings at issue occurred.

App. 8

when the Board finds adequate evidence that they will meet the criteria set forth in [Sections 153.474 and 153.476 of the Akron Zoning Code]. The Board may enact sufficient and reasonable conditions and safeguards as it may deem necessary to assure the proper development of the variances consistent with its powers.

The BZA's jurisdiction to grant a variance is limited to twenty-four circumstances specifically enumerated in the ordinance. *Id.* These circumstances include use variances with respect to “[a]ny *use* in any use district that is not specifically prohibited and that is in general keeping with, and appropriate to, the uses authorized in such district[.]” (Emphasis added.) Section 153.404(I) of the Akron Zoning Code. A “use” is “[t]he specific purpose for which a building or premises is or may be occupied.” Section 153.140(B) of the Akron Zoning Code. Consequently, the starting point for analyzing a request for a use variance is the nature of the use requested and whether that use is “specifically prohibited” within the district at issue. *See* Section 153.404(I) of the Akron Zoning Code.

{¶11} Although the property involved in this case straddles two different zoning classifications, it is undisputed that the portion of the property at issue is located in a U1 residential use district and an A1 area district. Section 153.230 of the Akron Zoning describes uses that are prohibited in every use district. An examination of prohibited uses, however, does not end with that ordinance. Section 153.240 of the Akron Zoning

App. 9

Code also describes the uses that are permitted and prohibited specifically within a U1 residential use district. According to Section 153.240(A), single-family and two-family dwellings are permitted depending on the area district and, “[s]ubject to the provisions of [Section 153.404 of the Akron Zoning Code] a school, public library, public museum, memorial building or community center building[.]” may also be permitted. Conversely, Section 153.240(F) restricts the uses within a U1 residential use district, providing in part:

Restriction of Uses. Within a Class U1 District, *no structure or premises shall be used, and no structure shall be erected which is to be used, for other than a Class U1 Use. In any portion of a Class U1 District that is within a Class A1 District, no building or premises shall be used, and no building shall be erected to be used, as a dwelling for more than one family. No separate dwelling unit of a two-family dwelling shall be occupied by more than one family or a maximum of five people.*

(Emphasis added.) This ordinance, therefore, generally prohibits uses outside of those permitted in a U1 residential use district and specifically prohibits multi-family dwellings within U1 residential districts that are also classified as A1 area districts.

{¶12} The trial court relied upon a different ordinance, Section 153.240(G) of the Akron Zoning Code, in its determination that the erection of multiple tents on fixed platforms was prohibited in a U1 residential use district. Section 153.240(G) does not pertain to

uses but, instead, limits the number of buildings that may be placed on a lot within a U1 residential use district to one. A “building” is defined as “[a]ny structure used for the support, enclosure, shelter or protection of persons, animals, chattels or property.” Section 153.140(B) of the Akron Zoning Code. A “structure” is “[a]nything placed, constructed or erected on the ground or attached to something having a fixed location on the ground[.]” including, but not limited to, “buildings, house trailers, semitrailers, earth station antennas, walls, towers, fences and outdoor advertising devices.” *Id.* Buildings and structures are distinct from the uses that occur within them. *See generally* Section 153.140 of the Akron Zoning Code.

{¶13} The Homeless Charity, Sage Lewis LLC, and Mr. Lewis did not request a variance from the requirements of Section 153.240(G), but a *use* variance pursuant to Section 153.404(I).<sup>3</sup> The trial court’s determination that Section 153.240(G) provided a specific prohibition that limited the BZA’s jurisdiction to grant a use variance under Section 153.404(I) was, therefore, incorrect. Similarly, the characterization of the variance request as a proposal for a “campground” in the proceedings before the BZA does not lead to the conclusion that the requested use is specifically prohibited because there is no specific prohibition on campgrounds in U1 residential use districts.

---

<sup>3</sup> This Court, consequently, makes no determination with respect to whether the BZA is authorized to grant a variance from the requirements of Section 153.240(G).

{¶14} Because the use variance request at issue is not specifically prohibited by the Akron Zoning Code, the next step in the analysis is whether the requested use “is in general keeping with, and appropriate to, the uses authorized in” a U1 residential and A1 area district. Section 153.404(I) of the Akron Zoning Code. Although the trial court determined that the requested use was specifically prohibited, it also considered, in the alternative, whether this requirement was met.

{¶15} As noted above, the portion of the property at issue is a U1 residential use and A1 area district. As the trial court acknowledged, “[t]he neighborhood certainly has a mixed use[.]” given that surrounding properties are zoned differently. Nonetheless, the threshold requirement of Section 153.404(I) of the Akron Zoning Code is whether the proposed use variance “is in general keeping with, and appropriate to, the uses authorized in” the zoning classification *of the subject property*. That property is presently zoned for residential use, and it lies adjacent to neighboring residential properties including Annunciation Terrace and individual homes.

{¶16} The trial court also referenced the recommendations of the Akron Planning Commission and the accompanying report that was submitted to the BZA. That report recommended that the BZA deny the variance, noting that multiple tents within a residential zoning district adjacent to an apartment building was “not harmonious or appropriate in appearance” for a residential neighborhood. The trial court also noted that the addition of multiple tents designed to house

individuals overnight on the subject property created circumstances different in character from the operation of a drop-in facility located in a permanent structure during daytime hours on the portion of the property that was not zoned for residential use. Finally, the trial court observed that although The Homeless Charity, Sage Lewis LLC, and Mr. Lewis argued that the proposed tents would be positioned in a manner that would limit visibility, it is the character of the use itself—and not the aesthetics of design—that are significant for purposes of Section 153.404(I) of the Akron Zoning Code.

{¶17} Although The Homeless Charity, Sage Lewis LLC, and Mr. Lewis maintain that the BZA and the trial court wrongly disregarded the fact that their request for a variance was different in character from the earlier request for a conditional use permit, neither the detailed narrative submitted in support of their request nor the proposed site plan support this distinction. To that point, The Homeless Charity, Sage Lewis LLC, and Mr. Lewis also argue that the trial court erred by considering the past effects of housing homeless individuals on the property in isolation from the changes that they now propose. The context within which the trial court noted that the BZA was justified in considering those possible effects was part of its determination that the proposed use variance was not in keeping with the character of a residential use district and, in that context, it was not improper for the trial court to do so.

{¶18} The Homeless Charity, Sage Lewis LLC, and Mr. Lewis direct this Court's attention, as they directed the trial court's attention, to the numerous affidavits documenting the positive effects that their efforts have had on the lives of homeless individuals and the voluminous record of emails provided to the city in support of their work. This Court does not seek to diminish the profound effect that The Homeless Charity, Sage Lewis LLC, and Mr. Lewis appear to have had on the lives of the individuals who provided affidavits to the BZA, nor do we dismiss the plight of the homeless in Akron as insignificant. But this Court is tasked in an administrative appeal from a zoning decision to consider the Akron Zoning Code as written, and we are constrained by our standard of review to do so in accordance with established precedent.

{¶19} Having done so, this Court concludes that the trial court's decision upholding the BZA's denial of the variance is supported by a preponderance of reliable, probative, and substantial evidence as a matter of law. *Independence*, 142 Ohio St.3d 125, 2014-Ohio-4650, at ¶ 14, citing *Kisil*, 12 Ohio St.3d at 34. Accordingly, the second assignment of error is overruled.

**ASSIGNMENT OF ERROR NO. 3**

THE TRIAL COURT ERRED IN HOLDING THAT APPELLANTS FAILED TO STATE AS-APPLIED SUBSTANTIVE DUE-PROCESS CLAIMS UNDER THE FEDERAL AND STATE CONSTITUTIONS.

{¶20} In their third assignment of error, The Homeless Charity, Sage Lewis LLC, and Mr. Lewis argue that the trial court erred by rejecting their argument that the Akron Zoning Code is unconstitutional as applied in this instance. This Court does not agree.

{¶21} As an initial matter, this Court notes that The Homeless Charity, Sage Lewis LLC, and Mr. Lewis have framed this assignment of error in terms of a motion to dismiss pursuant to Civ.R. 12(B)(6), arguing that “[a]t a January 31 status conference, the parties and the court agreed to use a quasi-12(B)(6) procedure to determine whether Appellants [could] state a claim that the BZA decision violated their substantive due-process rights.” Although it is clear that the trial court ordered the parties to brief the constitutional issues and held discovery in abeyance, no agreement such as the one referenced by The Homeless Charity, Sage Lewis LLC, and Mr. Lewis is reflected in the record. Moreover, in the context of an R.C. Chapter 2506 appeal, “a court of common pleas \* \* \* ‘performs an appellate function.’” *AT&T Communications of Ohio, Inc. v. Lynch*, 132 Ohio St.3d 92, 2012-Ohio-1975, ¶ 15, quoting *Dvorak v. Athens Mun. Civ. Serv. Comm.*, 46 Ohio St.2d 99, 103 (1976). For this reason, Civ.R. 12(B)(6) is inapplicable. *Lupo v. Columbus*, 10th Dist.

Franklin No. 13AP-1063, 2014-Ohio-2792, ¶ 18. Consequently, this Court must review the constitutional arguments within the framework of administrative appeals under R.C. Chapter 2506.

{¶22} When a party challenges the constitutionality of a zoning ordinance, two fundamental principles govern our review: zoning ordinances are presumed to be constitutional, and a party that challenges the constitutionality of a zoning ordinance must bear the burden of proving beyond fair debate that the ordinance is unconstitutional. *Goldberg Cos., Inc. v. Richmond Hts. City Council*, 81 Ohio St.3d 207, 209 (1998). *See also Jaylin Invests., Inc. v. Moreland Hills*, 107 Ohio St.3d 339, 2006-Ohio-4, ¶ 13. The constitutionality of a zoning ordinance may be asserted as a facial challenge or as a challenge to the validity of the ordinance with respect to a particular piece of property. *Jaylin Invests., Inc.* at ¶ 11-12. “A facial challenge asserts that there is no conceivable set of circumstances in which the statute would be valid. [*Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, ¶ 26.] An as-applied challenge, on the other hand, alleges that application of the statute in a particular factual context is unconstitutional.” *Simpkins v. Grace Brethren Church of Delaware, Ohio*, 149 Ohio St.3d 307, 2016-Ohio-8118, ¶ 20. The proponent of an as-applied constitutional challenge “has the burden of presenting a presently existing state of facts that make the [ordinance] unconstitutional under the appropriate level of scrutiny.” *Eppley v. Tri-Valley Loc. School Dist. Bd. of Edn.*, 122 Ohio St.3d 56, 2009-Ohio-1970, ¶ 13. *See also Harrold*

*v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, ¶ 38, citing *Belden v. Union Cent. Life Ins. Co.*, 143 Ohio St. 329 (1944), paragraph six of the syllabus (“[W]here statutes are challenged on the ground that they are unconstitutional as applied to a particular set of facts, the party making the challenge bears the burden of presenting clear and convincing evidence of a presently existing set of facts that make the statutes unconstitutional and void when applied to those facts.”).

{¶23} A challenge to the constitutionality of a zoning ordinance as applied, therefore, considers “whether the ordinance, in proscribing a landowner’s proposed use of his land, has any reasonable relationship to the legitimate exercise of police power by the municipality.” *Jaylin Invests., Inc.* at ¶ 20, quoting *Mobil Oil Corp. v. Rocky River*, 38 Ohio St.2d 23 (1974), syllabus. A property owner may raise an as-applied constitutional challenge in the context of an administrative appeal pursuant to R.C. Chapter 2506.<sup>4</sup> *Mobil Oil Corp.* at 26. *See also Community Concerned Citizens, Inc. v. Union Twp. Bd. of Zoning Appeals*, 66 Ohio St.3d 452, 453 (1993).

{¶24} The Homeless Charity, Sage Lewis LLC, and Mr. Lewis first argued that denial of the variance violated their rights under Section 16, Article 1 of the Ohio Constitution to due course of law by depriving

---

<sup>4</sup> In this respect, R.C. Chapter 2506 administrative appeals of zoning decisions are distinguishable from cases that arise from administrative bodies. *See, e.g., King v. Ohio Dept. of Job and Family Servs.*, 9th Dist. Summit No. 29198, 2019-Ohio-2989, ¶ 14.

them of a property interest in sheltering homeless individuals in tents, noting that they “ha[d] used their property in the past and intend to use their property in the future” for the same purpose.<sup>5</sup> A landowner obtains a property interest in a variance, however, once it is *granted* because it “gives the landowner the ability to use his land in a way that would be otherwise prohibited by the zoning [code].” *Scarnecchia v. Austintown Twp.*, 7th Dist. Mahoning No. 04 MA 253, 2005-Ohio-4504, ¶ 14, citing *Nunamaker v. Bd. of Zoning Appeals of Jerusalem Twp.*, 2 Ohio St.3d 115, 118 (1982). Further, as described above, the trial court’s decision upholding the BZA’s denial of the variance is supported by a preponderance of reliable, probative, and substantial evidence as a matter of law. The application of the Akron Zoning Code in this instance bore a reasonable relationship to Akron’s exercise of its police power in regulating the uses to which the property at issue may be put. See *Jaylin Invests., Inc.* at ¶ 20, quoting *Mobil Oil Corp.* at syllabus.

{¶25} The Homeless Charity, Sage Lewis LLC, and Mr. Lewis also argued that the denial of the variance violated their right to substantive due process under Section 16, Article 1 of the Ohio Constitution and the Fourteenth Amendment to the U.S. Constitution by depriving them of “entwined life and liberty interests in rescuing the homeless from grave peril with tents at 15 Broad Street.” As they further explain on appeal,

---

<sup>5</sup> The Homeless Charity, Sage Lewis LLC, and Mr. Lewis did not articulate a procedural due process argument under either the Ohio Constitution or the U.S. Constitution.

“[t]hese are entwined in the sense that the Charity’s homeless members have a right to be rescued when facing life-threatening danger. On the flip side, all three Appellants have a liberty interest in performing that rescue.” Because each of these arguments is premised upon their position that Section 16, Article 1 of the Ohio Constitution and the Fourteenth Amendment include a right to be rescued, our analysis must begin at that point.<sup>6</sup>

{¶26} In support of their argument, The Homeless Charity, Sage Lewis LLC, and Mr. Lewis direct this Court’s attention to *Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990). In *Ross*, the plaintiff asserted a claim under 42 U.S.C. 1983 and the Fourteenth Amendment alleging that a sheriff’s deputy “violated [her minor son’s] civil rights by interposing state power to prevent rescue.” *Id.* at 1425. The case resulted from the drowning death of the youth at a municipal event along the shores of Lake Michigan. *Id.* at 1424-1425. Numerous individuals, including lifeguards, firefighters, civilians, and a police officer, responded to a call for aid. *Id.* at 1424. Nonetheless, they were ordered to desist by a deputy sheriff who threatened them with arrest pursuant to a department policy that prohibited

---

<sup>6</sup> As noted above, the trial court determined that The Homeless Charity did not have standing to assert constitutional claims on behalf of its members. Because our analysis must begin by considering whether there is a right to be rescued under these circumstances, we proceed by assuming, without deciding, that each of the appellants had standing to raise their respective challenges. See *Nelson v. Mohr*, 10th Dist. Franklin No. 13AP-130, 2013-Ohio-4506, ¶ 5.

civilian rescue and provided that only divers from the local fire department could rescue in the waters of Lake Michigan. *Id.* at 1425. The deputy's actions resulted in significant delay. *Id.*

{¶27} The trial court dismissed the plaintiff's claims. *Id.* at 1426. On appeal, the Seventh Circuit Court of Appeals noted, as an initial matter, that the municipality had no constitutional duty to provide rescue services. *Id.* at 1428. Turning to the actions of the deputy, however, the Court characterized the policy at issue as one of "arbitrarily cutting off private sources of rescue without providing a meaningful alternative." *Id.* at 1431. The Court concluded that, viewing the allegations in the complaint as true, the policy upon which the deputy's actions were based "arbitrarily denied [the deceased] his fourteenth amendment right to life[]" for that reason. *Id.* at 1430. In reaching this conclusion, the Seventh Circuit noted that it was the decedent's "constitutionally protected right to life" itself that placed the claims within the ambit of 42 U.S.C. 1983. *Id.* at 1431. The Court also emphasized that it was the arbitrary nature of the county's alleged policy determination that led to its conclusion:

We take the policy alleged in the plaintiff's complaint at its face value. The plaintiff alleges that the county had a policy that prevented rescue even of persons "in danger of drowning." Thus, as portrayed in the plaintiff's complaint, [the county's] policy not only tolerated a risk that someone might drown but actually contemplated that some persons

would die for the sake of preventing harm to private rescuers. Protecting the lives of private rescuers rather than the lives of those drowning in the lake is an arbitrary choice. While no one suggests that the county desired to see people die in the waters of Lake Michigan, its alleged policy demonstrates a disregard for the value of the lives lost because of its enactment.

*Id.* Summarizing its conclusion, the Seventh Circuit reiterated this point: “the state cannot *arbitrarily* assert its power so as to cut short a person’s life.” (Emphasis added.) *Id.* at 1433.

{¶28} Thus, in *Ross*, the Seventh Circuit did not recognize a constitutional right to be rescued under the Fourteenth Amendment—or to rescue—but acknowledged that *arbitrary* state action may unconstitutionally deprive an individual of the right to life for purposes of the Fourteenth Amendment. *See id.* *Accord Beck v. Haik*, 6th Cir. No. 99-1050, 2000 WL 1597942, \*4 (Oct. 17, 2000). Even apart from the fact that the situation presented by this case is readily distinguishable, this Court cannot conclude that the Akron Zoning Code’s applicability in this instance is arbitrary. To the contrary, as the record demonstrates, there is a reasonable relationship to the legitimate exercise of the city’s police power in regulating the uses to which the property at issue may be put. *See Jaylin Invests., Inc.*, 107 Ohio St.3d 339, 2006-Ohio-4, at ¶ 20, quoting *Mobil Oil Corp.*, 38 Ohio St.2d 23 at syllabus. Because the assertion that the Fourteenth

Amendment guarantees a complementary right to engage in rescue is premised upon the same foundation, it fails as well.

{¶29} The Homeless Charity, Sage Lewis LLC, and Mr. Lewis also argued that Section 16, Article 1 of the Ohio Constitution also encompasses the right to be rescued from danger and, conversely, the right to engage in rescue. In support of their argument on appeal, they assert not only that the Ohio Constitution guarantees these rights, but that it “protects life, liberty, and property interests better than the Fourteenth Amendment[.]” and is subject to analysis “under a more stringent standard.” The Supreme Court of Ohio, however, has recognized that the “due course of law” clause contained in Section 16, Article 1 of the Ohio Constitution, is the equivalent of the “due process of law” clause in the Fourteenth Amendment. *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, at ¶ 48, citing *Sorrell v. Thevenir*, 69 Ohio St.3d 415, 422-423 (1994), citing *Direct Plumbing Supply Co. v. Dayton*, 138 Ohio St. 540, 544 (1941). Consequently, the as-applied challenges raised under the Ohio Constitution must fail for the same reasons articulated above.

{¶30} The third assignment of error is overruled.

**ASSIGNMENT OF ERROR NO. 1**

THE TRIAL COURT ERRED IN HOLDING THAT APPELLANTS SAGE LEWIS AND THE HOMELESS CHARITY LACKED STANDING.

{¶31} In their first assignment of error, The Homeless Charity, Sage Lewis LLC, and Mr. Lewis argue that the trial court erred by determining that The Homeless Charity and Mr. Lewis did not have standing. Because this Court has determined that their second and third assignments of error do not have merit, any possible error in this regard is not prejudicial to The Homeless Charity and Mr. Lewis, and this assignment of error is, therefore, moot. *See Cincinnati Golf Mgt., Inc. v. Testa*, 132 Ohio St.3d 299, 2012-Ohio-2846, ¶ 15; *State ex rel. United Auto., Aerospace & Agricultural Implement Workers of Am. v. Ohio Bur. of Workers' Comp.*, 108 Ohio St.3d 432, 2006-Ohio-1327, ¶ 60; *Fowler v. Ohio Dept. of Pub. Safety*, 10th Dist., Franklin No. 16AP-867, 2017-Ohio-7038, ¶ 23; *Nelson*, 2013-Ohio-4506, at ¶ 5. *See generally Heaney v. Crystal Clinic Orthopaedic Ctr., LLC*, 9th Dist. Summit No. 29579, 2020-Ohio-894, ¶ 6 (noting that an issue is moot when it is impossible for this Court to grant relief).

III.

{¶32} The second and third assignments of error are overruled. The first assignment of error is moot.

App. 23

The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

---

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

/s/ Lynne S. Callahan  
LYNNE S. CALLAHAN  
FOR THE COURT

HENSAL, P. J.  
SUTTON, J.  
CONCUR.

APPEARANCES:

JEFFREY ROWES, Attorney at Law, for Appellants.

DIANA K. SIMPSON, Attorney at Law, for Appellants.

REBECCA SREMACK, Attorney at Law, for Appellants.

EVE V. BELFANCE, Director of Law, and JOHN R. YORK, Assistant Director of Law, for Appellee.

BRIAN D. BREMER, Attorney at Law, for Appellee.

---

**IN THE COURT OF COMMON PLEAS  
COUNTY OF SUMMIT**

HOMELESS CHARITY,	)	CASE NO.:
et al.	)	CV-2019-02-0684
Plaintiff	)	JUDGE SUSAN
	)	BAKER ROSS
-vs-	)	
	)	
AKRON BOARD OF	)	<b><u>ORDER</u></b>
ZONING APPEALS	)	(Filed Jul. 14, 2021)
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; *Schoemaker 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

App. 38

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. *Wymyslo 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.” *Wymyslo* 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 unre-served 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.

App. 51

IT IS SO ORDERED.

/s/ Susan Baker Ross  
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

---

**IN THE COURT OF COMMON PLEAS  
COUNTY OF SUMMIT**

HOMELESS CHARITY,	)	CASE NO.:
et al.	)	CV-2019-02-0684
Plaintiff	)	JUDGE SUSAN
-vs-	)	BAKER ROSS
AKRON BOARD OF	)	<b>ORDER</b>
ZONING APPEALS	)	(Filed Feb. 4, 2020)
Defendant	)	

- - -

By agreement of counsel at the status conference held on January 31, 2020, the Court set the following briefing schedule:

Plaintiff-Appellant shall file their assignments of error and brief on or before **March 31, 2020**;

Defendant-Appellee shall file its response on or before **May 29, 2020**; and

Plaintiff-Appellant may file a reply on or before **June 20, 2020**.

The court orders that discovery on the unconstitutional as applied argument regarding the request for variance is stayed until briefing has occurred on all other issues. If the court finds this issue is still ripe for discovery further orders will be issued setting the scope and timing of said discovery.

App. 53

FAILURE TO COMPLY WITH THIS COURT ORDER OR ANY OTHER COURT ORDER SHALL RESULT IN SANCTIONS, INCLUDING BUT NOT LIMITED TO, DISMISSAL OR ADVERSE JUDGMENT.

IT IS SO ORDERED.

/s/ Susan Baker Ross  
JUDGE SUSAN BAKER ROSS

CC: ATTORNEY REBECCA J. SREMACK  
ATTORNEY JEFFREY ROWES  
ATTORNEY DIANA SIMPSON  
ATTORNEY BRIAN D. BREMER  
ATTORNEY JOHN YORK

CMP

---

**IN THE COURT OF COMMON PLEAS  
COUNTY OF SUMMIT**

HOMELESS CHARITY,	)	CASE NO.:
et al.	)	CV-2019-02-0684
Plaintiff	)	JUDGE SUSAN
	)	BAKER ROSS
-vs-	)	
	)	
AKRON BOARD OF	)	<b>ORDER</b>
ZONING APPEALS	)	(Filed Jan. 15, 2020)
Defendant	)	

- - -

This matter comes before the court on the *Appellants' Motion to Supplement the Administrative Transcript on Appeal with Memorandum and Affidavit in Support* that was filed on April 16, 2019. Appellee filed its Response in Opposition to Plaintiff-Appellants' Motion to Supplement the Record on April 29, 2019. Thereafter, on May 8, 2019, *Appellants' Motion For Leave to File Reply to Appellee's Response in Opposition to Appellants' Motion to Supplement the Administrative Transcript on Appeal* was filed. On May 20, 2019, the Defendant-Appellee filed its *Response in Opposition to Plaintiff-Appellants' Motion to Supplement the Record* opposing the filing of a Reply. Finally, on August 5, 2019, Defendant-Appellee filed a *Notice of Supplemental Authority* attaching a July 24, 2019 decision from the 9th District Court of Appeals. This matter was heard on November 1, 2019. Thereafter, on December 26, 2019, Appellants filed their Notice of Supplemental Authority.

The court finds that the parties are permitted to conduct discovery and supplement the record on the sole issue of the constitutionality of the City of Akron variance statute as applied to the facts of this case. The court hereby DENIES the motion to supplement the administrative record in this matter as to the administrative appeal in all other respects as set forth herein.

### **I. INTRODUCTION**

This matter arises from an ongoing dispute between the City of Akron and Sage Lewis, Sage Lewis LLC and the Homeless Charity regarding a tent community that existed in the area behind 15 Broad Street, Akron, Ohio. Sage Lewis LLC owns the property at issue. 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 and the case was assigned to Judge O'Brien. 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.

App. 56

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 decision 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. In their motion to supplement the record, Appellants argue that the transcript is incomplete and as such it must be supplemented. Specifically, Appellants argue that pursuant to R.C. 2506.03 they should be able to supplement the record extensively.

R.C. 2506.03 states as follows (emphasis added):

(A) The hearing of an appeal . . . shall proceed as in the trial of a civil action, but the court shall be confined to the transcript filed under section 2506.02 of the Revised Code **unless it appears**, on the face of that transcript or by affidavit filed by the appellant, that one of the following applies:

App. 57

(1) The transcript does not contain a report of all evidence admitted or proffered by the appellant.

(2) The appellant was not permitted to appear and be heard in person, or by the appellant's attorney, in opposition to the final order, adjudication, or decision, and to do any of the following:

- (a) Present the appellant's position, arguments, and contentions;
- (b) Offer and examine witnesses and present evidence in support;
- (c) Cross-examine witnesses purporting to refute the appellant's position, arguments, and contentions;
- (d) Offer evidence to refute evidence and testimony offered in opposition to the appellant's position, arguments, and contentions;
- (e) Proffer any such evidence into the record, if the admission of it is denied by the officer or body appealed from.

(3) The testimony adduced was not given under oath.

(4) The appellant was unable to present evidence by reason of a lack of the power of subpoena by the officer or body appealed from, or the refusal, after request, of that officer or body to afford the appellant opportunity to

use the power of subpoena when possessed by the officer or body.

(5) The officer or body failed to file with the transcript conclusions of fact supporting the final order, adjudication, or decision.

Appellants argue that they must be given the opportunity to conduct discovery and supplement the record on appeal because (1) the transcript does not contain all of the evidence adduced, (2) they were not permitted to cross examine any witnesses, (3) they were not able to subpoena persons and (4) the BZA failed to file conclusions of fact supporting its decision. Appellants also argue that they are advancing an unconstitutional as applied challenge to the decision and as such extensive discovery will be needed in this matter.

**II. APPELLANTS FAIL TO DEMONSTRATE  
GROUNDS PURSUANT TO R.C. 2506.03  
TO SUPPLEMENT THE RECORD ON  
APPEAL**

**A. THE MISSING PAGES OF THE REC-  
ORD ON APPEAL**

Appellants argue that the administrative record must be supplemented with an evidentiary hearing because the transcript filed by the Appellee was missing documents and contained illegible pages of the record. Appellees indicate that the pages were mistakenly omitted due to the scanning process and indicate they have since been submitted to the court correcting any error. The court finds that the Appellee has corrected this error and all pages of the record have now been

filed. The Court further finds that the record is not deficient or incomplete with the corrections. As such, the request to supplement on this basis is denied.

**B. APPELLANTS' RIGHT TO CROSS-EXAMINE WITNESSES AT THE BZA HEARING**

Appellants argue that they were unable to cross-examine the witnesses at the BZA hearing, and therefore the record must be supplemented to allow for the submission of additional evidence. Appellees argue, however, that Appellants did not seek to cross-examine witnesses at the BZA level and as such they may not raise this issue for the first time on appeal. In *Concerned Richfield Homeowners v. Richfield Planning and Zoning Comm'n*, 2010-Ohio-4095 (9<sup>th</sup> Dist, 2010) at ¶8, the Appellants argued that evidence was not given under oath in the hearing before the underlying commission. The Ninth District Court of Appeals noted that despite being represented by counsel at the proceeding, the Appellant failed to object to the issue. Further, the court noted that if they had objected the commission could have immediately corrected the issue. *Id.* Having failed to object they effectively waived the right to appeal on this issue. *Id.* In the instant matter we have the same issue. Despite being represented by counsel at every stage of the underlying administrative matter, Appellants failed to attempt to cross-examine witnesses. If they had sought to do so and were denied then they could certainly assert that denial herein. But having failed to even try to cross examine witnesses in the underlying proceeding, they

deprived the BZA of the opportunity to allow them to do so and they have effectively waived this right. In their Reply Brief Appellants completely ignore the foregoing legal argument and advance the position that the BZA hearing wasn't a reliable hearing. Counsel for Appellants had the responsibility to seek the allegedly lacking reliability before coming before this court and asking for an additional hearing herein. They have failed to establish anywhere in the record where they made such an attempt. The court finds that they have waived these objections and may not now assert these arguments on appeal.

### **C. THE POWER OF THE SUBPOENA**

Next Appellants argue that the BZA's lack of the power of the subpoena entitles them to supplement the record herein. However, the rule requires that appellant be "unable to present evidence by reason of a lack of the power of subpoena by the" BZA. A subpoena is used to compel testimony or produce records for a hearing. Appellants have failed to point out what records or witnesses they would have compelled if able to do so, nor have they demonstrated they sought to obtain those records or witnesses at the BZA hearing level. R.C. 2506.03 does not contain an exception to supplement the record for instances when discovery is not conducted. As such, Appellants must demonstrate that they were deprived of the right to subpoena and demonstrate how they were affected. The Court further finds, as the City points out, that had the Appellants used their right to cross-examine witnesses at the hearing they would have discovered that the two

witnesses who did testify authored the memo they are concerned about. The court finds that Defendants have waived these objections and may not now assert these arguments on appeal. Further, the court finds that the Defendants have not demonstrated that the subpoena power would have affected their handling of the BZA hearing.

**D. THE BZA FINDINGS OF FACT SUPPORT THEIR DENIAL OF THE APPEAL AND VARIANCE**

Appellants further argue that the BZA failed to make findings of fact in support of their decision to deny the appeal and variance. The court disagrees. The Ninth District Court of Appeal in *Concerned Richfield Homeowners* at ¶10 clearly states that the conclusions of fact need not take any specific form and there is no requirement that a document entitled conclusions of fact be filed. *Id.* Rather, the Court should look to the “face of the transcript to determine if the [BZA] failed to include its reasons in support of its final decision.” *Id.* In the instant case, prior to making the decision the Board had before them the Memo from the Department of Planning and Development outlining their reasons for issuing the order to comply. The transcript reveals that just prior to the vote Mr. Bolden discussed the issues raised by the appeal and request for variance, referred to Zoning Code section 153.474 stating that the request was not in harmony with the purpose and intent of the code, and moved to deny the variance. The Board voted unanimously to deny the request for variance. Thereafter the meeting minutes reflected

that the Board was of the opinion that the use would be detrimental to the surrounding neighborhood. Further, the BZA's Findings and Decision Following Hearing on Appeal dated January 30, 2019 found that the property was being used in violation of the Zoning Code and affirmed the Notice of Violation and Order to Comply. Based upon all of these items on the record, this court concludes that the record before the court contains sufficient findings by the board to demonstrate its reasons for denying the appeal and requested variance.

Based upon the foregoing, the court finds that the record may not be supplemented on appeal and no discovery is permitted herein.

### **III. APPELLANTS' CONSTITUTIONAL ARGUMENTS**

Appellants raise, for the first time in this court, the issue of the constitutionality of the Akron City Code section as applied to the facts of this case. Appellees argue that Appellants should have raised this challenge at the administrative level where there would be the opportunity for the parties to develop the facts before the fact finder Board of Zoning Appeals. Appellants argue that they are properly raising the "as applied" constitutional argument at the court.

The Ohio Supreme Court and the Ninth District Court of Appeals have consistently held that an "as applied" challenge must be raised at the first available opportunity which is typically at the administrative level. *Wymyslo v. Bartec, Inc.*, (2012) 132 Ohio St.3d

167; *Cleveland Gear Co. v. Limbach*, (1988) 35 Ohio St 3d 229; *Reading v. Pub. Util. Comm.*, (2006) 109 Ohio St.3d 193; *King v. Ohio Dept. of Job & Family Servs.*, 2019 Ohio 2989 (9th Dist., 7/24/2019). “[P]arties advancing an as-applied challenge must raise that challenge at the first available opportunity and failure to do so results in waiver.” *Wymyslo* at 173. When Appellants filed their appeal they outlined their argument in support of their appeal and request for variance. The BZA, much like the BTA in *Cleveland Gear Co*, is the forum where the argument regarding the constitutionality of any statutes previously applied and decisions previously issued should have been made and the evidence on those issues received. At no time did they assert a constitutional as applied argument.

However, appellants argue that this court is their first opportunity to raise the issue as to the variance. They assert that the **variance** was denied at the BZA level which is the first place this was requested and they are arguing that the variance statute was unconstitutional as applied. The Court agrees that Appellants could not argue that the variance statute was unconstitutional as applied until the BZA applied it to the facts of this case. The Board of Zoning Appeals held their hearing. They heard evidence as to why the variance should be granted and why it should not. The court finds that the parties are permitted to conduct discovery and supplement the record on the sole issue of the constitutionality of the City of Akron variance statute as applied to the facts of this case. A status conference will be scheduled by the court to establish

App. 64

the timelines needed to conduct said discover and brief  
the issues herein.

IT IS SO ORDERED.

/s/ Susan Baker Ross  
JUDGE SUSAN BAKER ROSS

CC: ATTORNEY REBECCA J. SREMACK  
ATTORNEY JOHN YORK  
ATTORNEY BRIAN D. BREMER

---

**CITY OF AKRON  
BOARD OF ZONING APPEALS  
Findings and Decision Following  
Hearing on Appeal**

Date: January 30, 2019

Mailing Address of Appellants Appeal No.: #24-2018-Z

Sage Lewis, LLC and Address of Property  
The Homeless Charity Affected

15 Broad St., 15 Broad St.,  
Akron, Ohio 44305 Akron, OH 44305

To Appellants and other interested parties:

This matter came for a hearing on January 30, 2019, at the request of Appellants, challenging a Notice and Order to Comply issued on December 6, 2018, concerning conditions at the Property Affected.

The Board of Zoning Appeals makes this finding(s) and decision having considered the evidence presented during the hearing, both in support of and in opposition to the appeal.

Having considered such evidence, the Board of Zoning Appeals finds that the requested use variance does not meet the requirements for granting a variance, and, therefore, the Board of Zoning Appeals denies the request for a variance.

This Finding and Decision is a final order. Please note your right of appeal pursuant to R.C. Chapters 2505 and 2506, which provides that the Court of Common Pleas may review every final administrative

App. 66

decision provided that an appeal is perfected within 30 days as required by R.C. Chapter 2505.

You are so notified.

Members:

/s/ [Signature] \_\_\_\_\_ /s/ [Signature] \_\_\_\_\_

/s/ [Signature] \_\_\_\_\_ /s/ [Signature] \_\_\_\_\_

/s/ [Signature] \_\_\_\_\_

---

**CITY OF AKRON  
BOARD OF ZONING APPEALS  
Findings and Decision Following  
Hearing on Appeal**

Date: January 30, 2019

Mailing Address of Appellants Appeal No.: #24-2018-Z

Sage Lewis, LLC and Address of Property  
The Homeless Charity Affected

15 Broad St., 15 Broad St.,  
Akron, Ohio 44305 Akron, OH 44305

To Appellants and other interested parties:

This matter came for a hearing on January 30, 2019, at the request of Appellants, challenging a Notice and Order to Comply issued on December 6, 2018, concerning conditions at the Property Affected.

The Board of Zoning Appeals makes this finding(s) and decision having considered the evidence presented during the hearing, both in support of and in opposition to the appeal.

Having considered such evidence, the Board of Zoning Appeals finds that the Property Affected was being used in violation of the City of Akron Zoning Code on December 6, 2018, and, therefore, the Board of Zoning Appeals affirms the Notice of Violation and Order to Comply.

This Finding and Decision is a final order. Please note your right of appeal pursuant to R.C. Chapters 2505 and 2506, which provides that the Court of

App. 68

Common Pleas may review every final administrative decision provided that an appeal is perfected within 30 days as required by R.C. Chapter 2505.

You are so notified.

Members:

/s/ [Signature]                      /s/ [Signature]

/s/ [Signature]                      /s/ [Signature]

/s/ [Signature]

---

**AKRON BOARD OF ZONING APPEALS**  
**APPEAL OF ORDER TO COMPLY**

To: The Board of Zoning Appeals, Akron, Ohio      Date: December 21, 2018

The undersigned (circle one) [**owner**] **holder of option / lessee** / \_\_\_\_\_ of the property herein involved, does hereby appeal the Superintendent of Building Inspection’s ORDER TO COMPLY (and NOTICE OF ADMINISTRATIVE PENALTY) dated December 6, 2018 to the Board of Zoning Appeals.

**SUPPORTING INFORMATION**

IF ALL THE APPLICABLE PROVISIONS BELOW ARE NOT SUPPLIED WITH THIS APPEAL, NORMAL PROCESSING WILL NOT OCCUR UNTIL ALL ITEMS ARE SUBMITTED.

1. Property Location (Address and Parcel Number(s)): 15 Broad Street, Akron, OH 44305  
(PPN: 6714282)

2. Violation(s) Cited: Zoning Code Section 153.240(F):  
“Use Restrictions in a Single-Family Residence Use District. The operation of a campground is not permitted in a residential use district.”

3. My reasons for this appeal are: Variance request as set forth in the attached documents.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



App. 71

Address: 2745 South      Address: \_\_\_\_\_  
Arlington Road

City, State: Akron, OH      City, State: \_\_\_\_\_

Zip: 44312      Zip: \_\_\_\_\_ Phone: (    ) \_\_\_\_\_

Phone: (330) 644-0061      Email:

Email:  
rebecca@sremacklaw.com

**A NON-REFUNDABLE FILING FEE shall accompany this appeal upon submittal to**  
The Department of Planning and Urban Development  
Municipal Building Room 405, 166 S. High Street,  
Akron, OH 44308-1628

**Please make CHECKS PAYABLE to City of Akron.**

..... DO NOT WRITE BELOW THIS LINE .....

Reason(s) for requiring an Appeal is/are: 153.412 Ap-  
peals from superintendents decision.

\_\_\_\_\_  
[Signature]  
Signature of Zoning Manager

This is to certify that a fee of \$ 75.00 has been received  
for investigation incident to this appeal. (\$75.00)

\_\_\_\_\_  
[Signature]  
Signature of City Employee

Receipt # 3458

Appeal # 24 -2019 Z Zoning Manager  
Title

Councilperson Milkovich      Ward 10

App. 72

**COUNCIL TIME STAMP    ZONING TIME STAMP**  
RECEIVED                    DEC 21 2018 PM 3:16  
2018 DEC 21 PM 3:32  
AKRON CITY COUNCIL

---

**APPEAL OF ORDER TO COMPLY:  
Case 2018-22975**

December 21, 2018

To: Akron Board of Zoning Appeals  
Zoning Division  
166 S. High St., Room 405  
Akron, OH 44308

From: Rebecca J. Sremack  
Attorney for Sage Lewis, Sage Lewis LLC, and  
The Homeless Charity  
15 Broad St.  
Akron, OH 44305

Re: *Appeal of December 6, 2018 Notice of Violation/  
Order to Comply, Case 2018-22975,  
PPN 6714282*

Sage Lewis, Sage Lewis LLC, and The Homeless Charity (“Appellants”) appeal the December 6, 2018 Notice of Violation/Order to Comply (“Order”). Counsel for the City of Akron served the notice on counsel for Appellants via email on December 7, 2018. A copy of the notice is attached as Exhibit 1.<sup>1</sup>

---

<sup>1</sup> The Homeless Charity is a 501(c)(3) nonprofit that serves the homeless at 15 Broad Street. Though not the subject of the December 6, 2018 Notice of Violation/Order to Comply, The

## INTRODUCTION

Appellants appeal the Order so that they may provide tents on private property as emergency, potentially life-saving shelter to the most destitute members of the community. They will comply with the Order, as people previously there have been able to obtain housing in the winter months, but they now seek a variance to allow them to use tents when Appellants' own indoor housing options, combined with options from other providers, prove insufficient and the only realistic alternative for a person in immediate need is the streets. As this appeal will demonstrate, Appellants propose an approach to emergency tent shelter that incorporates many lessons learned over the past two years to minimize impacts on surrounding properties.

In addition to constituting the notice of appeal, this document provides the information required by Zoning Code Section 153.420: (A) Appellants' point of contact; (B) "A description of the property involved"; (C) "A description of the nature of the appeal or variance requested"; (D) "A narrative statement demonstrating the compatibility of the variance with neighboring properties"; and (E) Site plan with relevant detail.

Along with this document, Appellants will also simultaneously pay the filing fee and submit the two-page form "Akron Board of Zoning Appeals Appeal of Order to Comply."

---

Homeless Charity is properly an appellant before the Board of Zoning Appeals because The Homeless Charity is "adversely affected by such order." Zoning Code § 153.418.

**REQUIREMENTS OF ZONING CODE  
SECTION 153.420**

**A. Appellants' Point of Contact**

Rebecca J. Sremack  
Sremack Law Firm LLC  
2745 S. Arlington Rd.  
Akron, OH 44312  
Tel: (330) 644-0061  
Fax: (330) 644-7241  
Email: rebecca@sremacklaw.com

**B. A Description of the Property Involved**

*i. Physical Description of 15 Broad Street*

The subject of the Order is a property commonly known as 15 Broad Street, Akron, Ohio 44305. Its Permanent Parcel Number is 6714282. The General Warranty Deed contains the surveyor's description of the property. A copy of the General Warranty Deed is attached as Exhibit 5.

More generally, 15 Broad Street is in the Middlebury area of Akron. It contains a two-story commercial building and an open yard behind the building. The property straddles two zoning classifications. The portion of the property with the building is zoned U3 Retail Business. The portion of the property with the open yard is zoned U1 Single Family. Appellants refer the Board of Zoning Appeals ("Board") to Page 32 of the Akron Zoning Map.

The Vulcan Machine Company and Ardmores, Inc., which lie in U3 Retail Business and U4 Commercial

Zones, form the southern and eastern border. Two properties that Appellants own—83 & 85 Kent Place—form the northern border of the open yard. Annunciation Terrace, a low-income senior apartment complex is directly north of the building on 15 Broad Street. Appellants’ building on 15 Broad Street and a portion of Annunciation Terrace form the western border of the open yard. Annunciation Terrace is the only building on adjacent land owned by someone other than Appellants that has a direct view of the open yard behind 15 Broad Street.

*ii. Recent Use of the Property to Shelter the Homeless*

The Order at issue in this appeal directs Appellants to dismantle what remains of an informal tent village for homeless Akronites who sought refuge from the streets. The following briefly recounts the formation of the initial tent village, Appellants’ application for a conditional-use permit, and the success since September 2018 in finding appropriate indoor accommodations for those who were in tents.

In 2016, Appellant Lewis hired some homeless people to help with his auction business at 15 Broad Street. They would gather unsold items for donation to local charities. Some of his homeless employees asked if they could open a thrift store at 15 Broad Street to sell those unsold items and use the revenue to help the homeless community. Appellant Lewis agreed and this collaboration began. *See* Exhibit 7, July 6, 2018 Affidavit of Sage Lewis (“July Lewis Aff.”), ¶ 18.

In January 2017, the Summit County Metro Parks department swept through a disused railway right-of-way to evict homeless people squatting in the woods. July Lewis Aff. ¶ 19. Metroparks took this action to construct the Freedom Trail hike-bike trail. *Id.*; see also Jennifer Conn, Summit Metro Parks Gives Notice to Akron’s Homeless to Clear Way for Freedom Trail Construction, Cleveland.com (Dec. 29, 2016), *available at* <https://www.cleveland.com/akron/index.ssf/2016/12/summit-metro-parks-evicts-akro.html> (last visited Dec. 19, 2018).

Some of those displaced from the railway tracks approached Appellant Lewis about pitching their tents in the open yard of his property at 15 Broad Street. July Lewis Aff. ¶ 19; Exhibit 3, December 21, 2018 Affidavit of Sage Lewis (“December Lewis Aff.”) ¶¶ 3–4. Given the biting January cold, he agreed. No one was permitted to sleep indoors due to Fire Department occupancy rules, but he allowed people to warm up in the basement while awake. December Lewis Aff. ¶ 4. More homeless people began to congregate at 15 Broad Street in search of shelter and safety. *Id.* ¶ 6.

There were too few rules at this early juncture. Some of the homeless lit fires for warmth and were not properly respectful of neighbors. July Lewis Aff. ¶¶ 21–22. Indeed, many of the concerns that the residents of Annunciation Terrace have voiced about the homeless relate to this early phase.

Appellant Lewis recognized that providing emergency shelter required two things: (1) rules and

structure that would provide safety to the homeless and minimize impacts; and (2) resources to help the homeless transition to permanent, stable housing as soon as possible. July Lewis Aff. ¶¶ 23–24. Appellant Lewis implemented a code of conduct that, among many other requirements, imposed strict rules regarding violence, theft, substance use, and non-compliance with court-ordered treatment plans. *Id.* ¶¶ 28–30; Exhibit 15, June 25, 2018 Affidavit of Herman Wyatt (“June Wyatt Aff.”), ¶¶ 19–21 and its Ex. 1.<sup>2</sup> He also built relationships with social-service and housing providers, and created an infrastructure within 15 Broad Street to help the homeless secure appropriate indoor accommodations as quickly as possible. July Lewis Aff. ¶¶ 42–44; December Lewis Aff. ¶¶ 8–10; Exhibit 31, Affidavit of Keith Esparza, ¶¶ 3–5, 9.

As the situation evolved, the building at 15 Broad Street also became a day center for not just the homeless, but also other impoverished Akronites. The day center offers, at no charge, volunteer-provided meals, a pantry with food that can be taken home, showers, laundry facilities, clothing and bedding, desktop computers and wi-fi. December Lewis Aff ¶ 7.

---

<sup>2</sup> Attached to this appeal is a series of affidavits and declarations from people who used to stay in tents behind 15 Broad Street. These documents were drafted when many still lived there; each document shares experiences, how the author came to stay at 15 Broad Street, and the impact of the community. They provide support for various assertions in this appeal, and Appellants urge this Board to read all of them. Some affidavits by supporters are also included.

By spring 2018, Appellants wanted to secure formal permission for the use of tents as emergency shelter to avoid putting the Akron Planning Department in the position of having to formally conclude that the tents violated the Zoning Code and issuing a notice of violation/order to comply similar to the Order at issue in this appeal. To accomplish this, Appellants voluntarily applied for a conditional-use permit in April 2018. December Lewis Aff ¶ 15. The Akron Planning Department and the City Council held a series of hearings through September 10, 2018. Appellants, hundreds of members of the public, Planning Department staff, and the City Council contributed to an administrative record running over 1,000 pages.

On September 17, 2018, a divided City Council denied the conditional-use permit. On October 16, 2018, Appellants—including the 501(c)(3) nonprofit The Homeless Charity—appealed the denial. That legal challenge remains pending in the Summit County Court of Common Pleas.

Even as consideration of the conditional-use permit proceeded along its separate track, Appellants, city officials, and social-service providers in the Continuum of Care pulled out all the stops in the fall of 2018 to house as many homeless people as possible. That, as discussed below, was a great success and provides the context for the variance Appellants now seek, which differs in certain material respects from the conditional-use application.

**C. Appellants Will Comply with the Order, But Seek a Variance to Use Tents Only as Urgent, Potentially Lifesaving Shelter from the Streets in a Manner Designed to Address Concerns Raised During the Conditional-Use Process**

Appellants have spent the last three months working diligently with the Continuum of Care (the local coalition of social-service providers) to get people into housing and other indoor shelters. The hard work of all involved, coupled with the relaxed shelter standards for the winter, has resulted in people leaving the tents and moving indoors. But when the weather warms up again, fewer shelter options will be available, and Appellants seek a variance to allow them to use tents again as emergency, potentially life-saving shelter for those who cannot obtain indoor shelter. Notably, the recent success in housing Akron's homeless will allow Appellants to work with this Board as part of the variance process to develop a strategy for using tents that further minimizes their impact.

*i. Appellants Intend to Comply with the Order and Dismantle the Few Remaining Tents*

Appellants intend to comply with the Order because Appellants, in cooperation with the City and Continuum of Care, have made tremendous headway during the fall of 2018 at securing indoor accommodations for the homeless who had been seeking shelter at 15 Broad Street. December Lewis Aff. ¶¶ 20–26.

As of this writing, Appellants expect to be able to secure indoor options for the handful of homeless people sheltering at 15 Broad Street in tents. *Id.* ¶ 26. This will enable Appellants to comply with the Order's January 5, 2019 deadline. *Id.* ¶ 25

*ii. Appellants Seek a Variance to Allow the Targeted Use of Tents as Urgent, Potentially Lifesaving Shelter When the Only Realistic Alternative Is the Streets*

The recent success of the coordinated effort to get the homeless indoors is a testament to what can be accomplished when everyone takes extraordinary steps. As monumental as this success is, however, it is likely that in coming months there will be homeless residents of Akron who, once again, cannot immediately secure indoor shelter due to lack of available housing/shelter space, a lack of official government documents (such as a birth certificate or driver's license), or other factors that make immediate indoor housing impossible.

Appellants anticipate this problem for several reasons. First, the Continuum of Care announced this month that it is ending its concerted push to accommodate the homeless at 15 Broad Street. *See* December Lewis Aff. ¶ 28; Jim Mackinnon, Akron Gives Tent City 30 Days to Shut Down and Clear Out, Akron Beacon Journal (Dec. 9, 2018), *available at* <https://www.ohio.com/news/20181209/akron-gives-tent-city-30-days-to-shut-down-and-clearout> (last visited Dec. 19, 2018). This means that the homeless seeking

housing will have to rely on the City’s 211 process, which, as helpful as it is, can be time-consuming. December Lewis Aff. ¶ 28. Second, as the weather improves, the lenient admission criteria in various temporary shelters will be withdrawn. *Id.* ¶ 27. Third, people enduring intolerable situations at home during the winter—women suffering domestic abuse, for example—may resort to the streets as it becomes less harsh outside. Last, homelessness is endemic to the human condition and it is not presently realistic to believe that our current infrastructure for helping the homeless will catch everyone. It is also a problem acutely felt in Akron, a city that had the second highest unsheltered homeless rate in Ohio’s urban areas in 2017. *See* Exhibit 4, Report of Aaron K. Sorrell, Community Planning Insights (“Sorrell Report”), at 2–3.<sup>3</sup>

Appellants do not anticipate the need for urgent temporary shelter to result in as many tents as were used in the past. First, Appellants, and perhaps especially Appellant 501(e)(3) nonprofit The Homeless Charity, continue to secure property for use as indoor shelter. December Lewis Aff. ¶ 18. For example,

---

<sup>3</sup> In the summer of 2018, Appellants sought the formal opinion of Aaron Sorrell, a planning expert who used to work for the City of Dayton and address its homelessness challenges. Mr. Sorrell drafted a report regarding the conditional-use permit sought for 15 Broad Street, which is attached as an exhibit to this appeal along with his résumé. While the circumstances have changed since he authored this report, it is still of value in analyzing the emergency use of tents at 15 Broad Street. The report also analyzes the same factors this Board will address in its analysis in the present appeal.

Appellants obtained the adjacent residential property at 85 Kent Place. *Id.* ¶ 16. They are working productively with the Akron Planning Department on a conditional-use permit for 85 Kent Place to expand the number of people who can sleep there (and Appellants want to reiterate their appreciation for the Department's hard work). *Id.* ¶ 17. Second, Appellants are also in negotiations to be able to use nearby property that is already approved as shelter space. *Id.* ¶ 18. Third, Appellants are seeking to rehabilitate abandoned property available through the county landbank to provide further indoor options for the homeless. *Id.* Finally, the lessons Appellants have learned (and will continue to learn), coupled with the relationships they have established (and will continue to establish), will make it easier to secure indoor accommodations as quickly as possible. *Id.* ¶¶ 14, 19. But obtaining new property and making it fit for habitation as a shelter takes time, and Appellants do not wish to turn people away as that process takes place. *Id.* ¶ 32.

The core purpose of the variance will allow a tent to be erected to provide emergency, potentially lifesaving shelter to someone who has no realistic alternative to the streets. *Id.* ¶ 33. As the Board no doubt understands, unsheltered, street-dwelling homelessness presents immense dangers, physical and psychological. *See Sorrell Report at 3.* The street-dwelling homeless suffer violence at rates far higher than those in a secure setting. The street-dwelling homeless also suffer much higher rates of mental illness, substance abuse, social isolation, sleep deprivation, and other stresses

that most people, fortunately, never have to confront. The street-dwelling homeless also impose a disproportionate burden on emergency services and other public agencies. *Id.* Appellants seek a modest variance to allow the street-dwelling homeless with no realistic indoor option to seek refuge in a tent only until they can secure indoor accommodation, whether in one of Appellants' indoor properties or one of Akron's traditional shelters.

Appellants are not exaggerating when they say that a sanctioned tent community for emergency shelter is lifesaving. The homeless have experienced life-threatening medical crises at 15 Broad Street that were identified and immediately treated only because the homeless were sheltering at a place where people like Appellants and other homeless Akronites cared about them. Exhibit 23, Affidavit of Ethan Ihrcke, ¶¶ 9–10.

Appellants are not asking for permission to allow the homeless to live in tents as an alternative to seeking permanent, stable housing. Appellants—in absolute agreement with Mayor Harrigan, the Planning Department staff, and the Continuum of Care—do not believe that tents are an appropriate long-term solution to homelessness. December Lewis Aff. ¶ 33. Indeed, the effective, good-faith efforts by all over the fall of 2018 demonstrate the commitment everyone shares to helping the homeless transition to appropriate indoor shelter as quickly as possible. *Id.* ¶ 20.

As described in the narrative in Section D below, the use of tents as emergency, potentially lifesaving shelter (in the absence of other options) is consistent with the criteria set forth in Zoning Code Sections 153.474 and 153.476.

*iii. The Board Has Independent Authority to Grant the Variance*

The City Charter invests the Board with the authority to grant individual variances without the oversight or approval of Akron’s elected officials. City Charter § 102. To be sure, the Charter authorizes the City Council to define the matters the Board can consider by ordinance, *id.* § 102(1), and the Zoning Code sets forth those matters, Zoning Code § 153.404, but the Board has plenary power when it comes to issuing variances that are within the scope of its authority. An appeal from the Board is taken directly to the Summit County court, not the City Council or any other municipal entity. *Willoughby Hills v. C.C. Bar’s Sahara*, 64 Ohio St. 3d 24, 31–32 (1992). The design and structure of the Board—particularly its being composed solely of local citizens, not municipal employees or elected officials—ensures that variances are consistent with the public welfare and insulated from political influence.

The Zoning Code authorizes the Board to grant the requested variance via a general catch-all: “Any use in any use district that is not specifically prohibited and that is in general keeping with, and appropriate to, the uses authorized in such district.” Zoning Code

§ 153.404(I). The use of tents as temporary, potentially lifesaving shelter is not specifically prohibited.

**D. Narrative: The Requested Variance Is Compatible with Neighboring Properties**

The use of tents at 15 Broad Street is consistent with the Zoning Code. In evaluating the appeal, the Board must put the emergency use of tents in their proper context given the nature of the area where 15 Broad Street is located and its lawful use as a day center for the homeless and working poor of Akron. When viewed in this proper context, the presence of emergency tents does not conflict with, but is instead consistent with, the area and the principles in the Zoning Code.

*i. The Requested Variance Must Be Examined in Light of the Permissible Use of the Building at 15 Broad Street as a Daytime Resource Center for the Homeless*

To understand the requested variance, it is first necessary for the Board to understand the role of the building at 15 Broad Street as a daytime resource center for the homeless. As discussed earlier, homeless people began coming to 15 Broad Street in 2016 when Appellant Lewis hired them to help with unsold items from an auction business he ran out of the building. July Lewis Aff. ¶ 18. Appellant Lewis then provided the homeless with space in the basement to set up a

thrift store to sell items that went unsold from the auction. *Id.*

When Summit County, in January 2017, ejected homeless people from the woods along disused railway tracks, some who knew Appellant Lewis asked whether they could pitch their tents on his property. July Lewis Aff. ¶ 19; December Lewis Aff. ¶ 3. Given the freezing temperatures, Appellant Lewis agreed. This act of compassion led to the rise of the tent community in the open yard next to the building. The Order that Appellants now appeal directs Appellants to terminate the vestiges of this initial tent village.

15 Broad Street, however, is not primarily about sheltering the homeless in tents. The top floor of the building is used by Appellants and commercial tenants as office spaces under the U3 Retail Business designation. The bottom floor is where Appellants operate the day center for the homeless and impoverished, which is the primary purpose of Appellants' outreach at 15 Broad Street. December Lewis Aff. ¶ 7. Importantly, the day center is open to all Akronites—whether homeless or just in need of helping hand. For example, people can come and eat donated food around the community table—often prepared hot by volunteers and the homeless themselves—or pick up a bag of food from the pantry to take home. *Id.* People can also come for free clothing and blankets, free use of laundry facilities, and free showers. *Id.*

Beyond these basic physical needs, the day center provides help in obtaining lost identification (usually

essential for securing housing and other services), help in applying for housing and social services, the free use of desktop computers and wifi, resources for addressing substance abuse and mental-health issues, and access to a community of people who understand the struggle to regain one's footing in mainstream society. *Id.* ¶¶ 7–9.

To its great credit and something for which Appellants are thankful, the City does not object to the use of the building at 15 Broad Street as a day center for the homeless. The City only objects, as the Order under consideration here demonstrates, to the use of tents to shelter homeless people at night in the open yard next to the building.

The continued presence of homeless and impoverished Akronites at 15 Broad Street provides the essential context for the Board's consideration of the requested variance. The goal here is not to push the homeless and the poor away so no one has to interact with them or be made uncomfortable (or inconvenienced) by their existence. Regardless of the Board's decision on the requested variance, neighbors are going to be exposed to the reality of Akron's homeless and working poor during the day as Appellants continue their outreach.

To be sure, Appellants are determined to work with neighbors to minimize impacts. They have prohibited loitering in front of 15 Broad Street or anywhere on the sidewalk and passing through the Annunciation Terrace parking lot to get to the Annunciation Church,

where free meals are offered weekly. July Lewis Aff. ¶ 39. And Appellants are responsive to the neighbors and wish to make the area pleasant for all. December Lewis Aff. ¶ 12. The success of the recent effort to shelter so many homeless gives Appellants and neighbors an opportunity to press the reset button.

Thus, for the purposes of the Board's evaluation of the requested variance, the question is this: Given that the homeless and the working poor will be continuously present at 15 Broad Street, what is the additional impact of allowing the temporary use of tents at night when doing so may be the difference between life and death?

*ii. The Strategic Use of Tents to Provide Temporary, Potentially Lifesaving Shelter Satisfies the Criteria in Zoning Code Sections 153.474 and 153.476*

The Board's evaluation of Appellants' variance request should be understood in light of the hierarchy of interests set forth in the very first paragraph of the Zoning Code: "In interpretation and application, the provisions of this Zoning Code shall be held to be the minimum requirements adopted for the promotion of the public health, safety, comfort, convenience, prosperity, and general welfare." Zoning Code § 153.100. Health and safety sit atop this hierarchy. Other considerations, such as comfort and convenience, come lower. This ordering of interests reflects that the Zoning Code must be applied in a manner that treats the interests

in health and safety as more important than the subordinate interests.

Here, the health and safety of real people—literally their ability to stay alive and possess some basic degree of health and safety—may depend on securing temporary nighttime shelter in a tent on the private property at 15 Broad Street (rather than squatting illegally on public or private property elsewhere). Whatever discomfort and inconvenience follows from the nighttime use of tents—remember, the homeless and the poor will be at 15 Broad Street during the day even if the variance is rejected—that discomfort and inconvenience pales in comparison to the superior public interests in health and safety.

1. The requested variance for the use of tents as temporary, potentially lifesaving shelter addresses the concerns raised by the Planning Department and neighbors during the conditional-use process

Appellants seek a variance that would allow them to use a tent to shelter a homeless person in immediate need whose only realistic option truly is a return to the streets. Appellants would use a tent as a last resort when Appellants do not themselves have appropriate indoor shelter and when no such indoor shelter is available at a nonsectarian facility.<sup>4</sup> The person using

---

<sup>4</sup> With great respect for its important work, Appellants do not believe that the requested variance can be conditioned on using the City's primary shelter, Haven of Rest. Aside from concerns expressed by many homeless people about safety and eligibility criteria, *e.g.*, June Wyatt Aff. 6–7; Exhibit 18, Affidavit of Brian

the tent would be required to secure safe indoor shelter as soon as possible. The tents will not be a long-term option or an alternative to proper indoor accommodations.

The following details of the requested variance respond directly to lessons Appellants have learned from neighbors, City officials, the conditional-use process, and the homeless of Akron. The requested variance, in adhering to the conditions below (and any other reasonable conditions the Board may require), will minimize impacts better than the prior iteration of the tent village while rescuing people from among the worst dangers that anyone in the United States can face.

Appellants would erect the tents on a hard, porous platform that would neither retain water nor result in unnatural run-off or destructive erosion. The open yard of 15 Broad Street is located on a slight incline

---

Mack, ¶¶ 8–9; Exhibit 29, June 26, 2018 Affidavit of Hugh Miller, ¶ 8, Haven of Rest is a private, sectarian entity that incorporates religious observance into its homeless outreach. *See, e.g.*, Exhibit 17, Affidavit of Andrew Fogler, ¶ 8; Exhibit 22, Affidavit of Donald Hayes, ¶ 9. Appellants do not suggest that it is improper to incorporate religion into good works done for the homeless. Rather, Appellants point out that a government entity likely cannot *require* a homeless person to choose between the streets and a sectarian facility when there is a nonsectarian option such as 15 Broad Street. The First Amendment to the United States Constitution and Section 7, Article I of the Ohio Constitution protect the rights of people to engage—or not—in religious activity. Indeed, “the [United States] Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise.” *Inouye v. Kemna*, 504 F.3d 705, 712–13 (9th Cir. 2007).

App. 91

that naturally drains into the Little Cuyahoga River. When a tent is not required, it would be dismantled.

Appellants will situate the tents as far south as possible to minimize any visual impact on the residents of Annunciation Terrace. *See* Exhibit 2, Site Plan. Appellants will also use tents of a standard size and color to maximize visual harmony. Tent users will be required to store their items in standardized bins to maximize visual harmony and avoid clutter. Appellants are open to tree plantings, other forms of vegetation, or creative screening options to enhance visual harmony. In sum, Appellants are open to innovative, financially feasible solutions that address the concerns of the residents of Annunciation Terrace.

Appellants will require socializing among all visitors, whether users of the day center or tent users, to be done in the outdoor area directly south of the building. This area is invisible to Annunciation Terrace to the north and essentially invisible from all other directions. Appellants will continue to enforce the quiet hours policy, which requires anyone outside to be quiet overnight. *See* June Wyatt Aff. ¶¶ 19–20 and its Ex. 1.

There will be zero tolerance for noise, odors, and trash in the yard or near 15 Broad Street generated by its visitors.

Fire suppression equipment will be readily on hand. Appellants will maintain clear corridors of egress from each tent to a safe area. There are indoor restrooms and portable ones outside, and there is a handwashing station outside.

In reading this section, please also review the Sorrell Report, specifically at pages four through six, as it addresses the main concerns the Planning Commission expressed regarding the conditional-use permit and its interaction with Zoning Code Section 153.474. While the Planning Commission expressed its concern that the tents would not meet five subsections of Section 153.474, Mr. Sorrell addressed each in turn and demonstrated why the concerns were less significant than the Planning Commission suggested. The conclusions of Mr. Sorrell are even more on-point today, as the variance Appellants seek is a more focused version of the conditional-use permit originally sought.

Appellants explain below how their proposed variance satisfies the criteria in Zoning Code Section 153.474.

2. Section 153.474(A): Harmony with Akron's comprehensive plan

Akron's comprehensive plans do not specifically address emergency shelter for the homeless in tents on private property. Thus, the question is whether the emergency use of tents on private property is consistent with the overarching objectives of comprehensive planning.

The first step is to acknowledge the sentiment expressed by the Planning Department during the conditional-use process that no one should be sheltered outdoors in a tent because everyone deserves better than a tent. At a basic moral level, Appellants agree. It is a tragedy that there are people in Akron who, for

whatever reasons, have had to resort to a tent at 15 Broad Street. Appellants are not seeking the requested variance to legitimate or normalize the use of tents as a long-term option for the destitute.

But just as Appellants acknowledge the validity of the Planning Department's concerns about tents, the Board must acknowledge the harsh reality of homelessness that aspirations cannot wish away. People find themselves in desperate situations without somewhere to sleep, and until they can address the underlying problems that contributed to that, they *do* live in tents or squat in abandoned buildings. Life would be much better for everyone if no one had to do that, yet the reality exists. Thus, the question here is not tents versus no tents.

The question is whether those who are in tents, cardboard boxes, or huddled on the porches of abandoned houses can be given temporary refuge at 15 Broad Street, where they can obtain reasonable safety from the elements and those who might do them harm. Allowing this form of emergency shelter is a humane response to an intractable social and economic problem. Akron's comprehensive plans, at bottom, seek to create a prosperous and harmonious society for all, and that may sometimes require the sort of compromise described in the requested variance.

3. Section 153.474(B): Harmony with the general vicinity

There is no conflict between the requested variance and harmony with the general vicinity. First, the specific infraction identified in the Order is misleading. The Order notifies Appellants that they are in violation of Zoning Code Section 153.240(F) for operating a campground in a “Single Family Residence Use District.” Exhibit 1. While it is technically true that the open yard at 15 Broad Street is zoned single-family, the reality on the ground is far different—and far from being single-family residential. The uses immediately surrounding 15 Broad Street prove that characterizing the vicinity as single-family use is inaccurate.

- To the immediate southeast: Vulcan Machinery Corporation (U4 Commercial)
- To the immediate south: Ardmore Inc., a non-profit for the developmentally disabled (U3 Retail)
- To the immediate west: A multi-family high rise under construction (U3 Retail)
- To the immediate north: Annunciation Terrace multi-family apartment building (U3 Retail and UI Single Family)
- To the immediate northwest: two residential properties that Appellants own (U1 Single Family); one of which is presently obtaining a conditional-use permit to allow more unrelated people to live together than the Zoning Code allows and which shelters the homeless indoors.

App. 95

- Within a block in any direction from 15 Broad Street, there is property zoned retail, commercial, ordinary industry, and heavy industry, and various conditional uses such as the new apartment building and Annunciation Terrace.

Thus, consideration of the requested variance and the degree to which 15 Broad Street harmonizes with neighbors, must take into account the reality that this part of Middlebury is not a picture-book residential neighborhood of single-family homes in every direction.

Second, the question here is not harmony between the homeless and the impoverished, on the one hand, and the various multi-family, retail, commercial, ordinary industrial, and heavy industrial uses, on the other hand. As Appellants emphasized above, the homeless and impoverished will be a continuous (and lawful) presence at 15 Broad Street, regardless of the Board's action on the requested variance. It is not plausible that the immediate vicinity will become *more* harmonious if the desperate homeless are left to wander the streets at night rather than obtain temporary, potentially lifesaving shelter in a tent at 15 Broad Street until appropriate indoor accommodation can be promptly secured.

App. 96

4. Section 153.474(C): No hazard to existing or future uses

Sheltering the neediest members of society is not hazardous to anyone or any use, present or future. To the contrary, everyone is better off, present and future.

5. Section 153.474(D): Adequate service by public infrastructure and services

Public infrastructure and services are more than adequate for the proposed variance.

6. Section 153.474(E): No added public costs or economic detriment

**Public Costs:** The use of tents for temporary, potentially lifesaving shelter does not add to any public cost. To the contrary, providing the street-dwelling homeless with emergency shelter when there is no suitable indoor option *diminishes* public cost. The street-dwelling homeless population places great pressure on local emergency services because the enormous risks of this worst form of homelessness result in astronomical rates of death, injury, disease, mental illness, and substance abuse. Caring for the most desperate of the homeless reduces the need for police, fire, ambulance, and hospital emergency-room personnel to address acute crises.

Furthermore, to the extent that the presence of the homeless at 15 Broad Street results in an above average number of emergency-service calls at that location, that is related to *homelessness*, not sheltering the homeless at night on a temporary basis when no

better accommodations are available. Because the Board's resolution of the requested variance will not alter the presence of the homeless and impoverished at 15 Broad Street, there is no reason to believe that denying the variance will materially reduce public costs at 15 Broad Street. Those costs will exist anyway. Indeed, when the homeless are dispersed, they are more difficult for first responders to find and access. The City of Akron does not benefit by forcing Appellants to scatter the homeless to the wind at night where they will collectively endure more suffering and impose higher public costs than if they were cared for in one place.

**Economic Detriment:** There is no economic detriment to allowing the use of tents as temporary, potentially lifesaving shelter. Whatever hypothetical economic detriment might exist due to the presence of the homeless and impoverished at 15 Broad Street, denying the requested variance will not diminish that detriment. The homeless and working poor will still be present, coming and going, from 15 Broad Street all day long. The addition of some tents periodically in cases of acute emergency is not going to impose some additional economic cost that would not otherwise exist. To the contrary, the illegal presence of the unsheltered homeless on public and private property is worse for the community than allowing those people to find temporary refuge on private property with the owner's consent.

7. Section 153.474(f): No excessive traffic, noise, smoke, fumes, glare, or odors

**Traffic:** There will not be excessive traffic because the overwhelming majority of Akronites seeking help arrive on foot, often after using public transportation. In any case, whatever vehicular traffic there is related to Appellants' outreach to the homeless and impoverished, that is the result of daytime outreach at 15 Broad Street that is permissible. Providing temporary, potentially lifesaving shelter to the homeless in tents will have no effect on traffic.

**Noise:** Appellants will be exceptionally strict about noise. To the extent Annunciation Terrace has raised concerns about noise, those pertain to the earliest iteration of the tent community that, having accomplished its goal, is being dismantled. In any case, the use of tents in a manner described above in Subsection (D)(ii)(1) will not result in excessive noise. Appellants note that Annunciation Terrace is near the busy thoroughfare of Market Street, a new high-rise multi-family residence is being constructed across Broad Street, and the Middlebury area in this vicinity hums with activity.

**Smoke:** None. Fires are and will be strictly prohibited.

**Fumes:** None.

**Glare:** None.

**Odors:** None. Garbage and recycling material is stored in appropriate containers on the south side of the building away from Annunciation Terrace.

8. Section 153.474(G): Adequate vehicular approaches

There is no vehicular intensity to the use of 15 Broad Street as an outreach center for the homeless and impoverished. As noted above, the overwhelming majority of Akronites seeking help arrive on foot, often after using public transportation.

15 Broad Street has angled, on-street parking for several vehicles. Appellant Lewis usually parks his truck there. Volunteers come and go by car as they visit to drop off food or donations or work on site.

In any event, to the extent vehicles visit 15 Broad Street, that is during the day, not at night, and hence the requested variance would not alter vehicular approaches.

9. Section 153.474(H): No loss of natural, scenic, or historic features

No natural, scenic, or historic features are present on the property.

**E. Site Plan with Relevant Detail**

A site plan with appropriate details, as required by Zoning Code § 153.420(E), is attached as Exhibit 2.

**F. A Fee in the Amount of \$75 Accompanies the Filing of This Appeal**

On filing this appeal, Appellants will pay the \$75 required under Zoning Code 153.420(F).

**G. The Two-Page Document from the Board's Website Is Also Attached**

Appellants have also attached the two-page document from the Board's website called "Akron Board of Zoning Appeals Appeal of Order to Comply."

**CONCLUSION**

Appellants respectfully request a modest variance to allow them to provide emergency, potentially lifesaving shelter in tents on a temporary basis when there is no realistic option but the streets. Appellants' proposed approach to the use of tents in the future addresses impacts on neighboring property, which will be minimal given that the homeless and impoverished will be a continuous daytime presence at 15 Broad Street. Appellants are eager to work with the Board and planning department to craft a variance that maximizes the overriding interest in health and safety, while minimizing effects on the comfort and convenience of others.

---

**STATE OF OHIO**            )  
  ) **SS:**  
**COUNTY OF SUMMIT** )

I, Sage F. Lewis, of full age, being duly sworn according to law upon his oath deposes and says:

1. I am a citizen of the United States, a resident of the State of Ohio, and over 18 years of age, I make this affidavit based on my personal knowledge of the facts set forth and am competent to testify thereto if called as a witness at trial.

2. I understand that this affidavit is being made under oath, I understand the legal obligation to be truthful, and I will testify the whole truth based on my personal knowledge.

**BACKGROUND**

3. I live in Akron, Ohio with my wife and son.

4. I was born in Medina, Ohio. My wife and I moved to Akron in 2002. I have lived in Akron continuously since then.

**BUSINESS**

5. My wife, Rocky, and I am a digital marketing company called Sage Rock, Inc. (“Sage Rock”). We help companies generate leads online using search engines, social media, and video. In 1999, my wife and I wanted to create a company to do together. Rocky was a professional writer and editor. I was learning about building websites and other technical internet experience. The search engine optimization industry was new. We

would help businesses design their websites, including the writing, to help the sites show up earlier in search results.

6. In 2008, we filed our articles of incorporation for Sage Rock, a for-profit Ohio corporation. Prior to that, we were an Ohio LLC.

7. Sage Rock purchased the property located at 15 Broad Street in 2008. 15 Broad is street is a two-story commercial building.

8. The upstairs part of the building is broken up into several different office spaces, which we lease out to various businesses. The entire downstairs part of the building is a community area for the tent community.

9. Sage Rock purchased the building because the company had 20 employees at that time. We needed room for those employees. But we downsized our company after the recession.

10. Currently, Sage Rock has two employees, my wife and me.

11. We learned about 15 Broad because the salon where my wife got her hair cut at the time was in the building. We were nearing the end of our lease in another building. We decided that it made economic sense to buy a building. We did not look at any other buildings. I personally love this building and it was a stroke of luck that it was for sale.

12. 15 Broad is in a low-income neighborhood. My building is surrounded by multi-use residential and commercial buildings. A new low-income building is planned for the empty lot across the street. There are low-income single-family homes a few blocks away from us.

AKRON'S TENT CITY

13. The mission statement of Akron's Tent City states that we meet the homeless where they are today to help them get where they want to go tomorrow.

14. The goal of Akron's Tent City is to move people to permanent, stable housing. Residents must demonstrate on a daily basis that they are working towards the goal of permanent, stable housing.

15. Akron's Tent City is a tent community, but our goal is permanent housing, not living permanently in tents. Tents are a temporary measure for the homeless with nowhere else to go but the streets.

16. I first met the homeless on the street when trying to gather signatures in a run for Akron mayor as an independent. I had no prior experience with the homeless. I never spoke to them. I tried to avoid them. I either never thought about the homeless or I had the worst stereotypes about them.

17. But I had to stand on the streets for hours and hours to gather signatures, and the homeless always wanted to talk to me. I listened to their personal stories and realized that my preconceptions were wrong, I discovered that homeless people had

compelling human stories. They weren't stereotypes to me anymore.

18. After my run for mayor proved unsuccessful, I went back to starting an auction company at 15 Broad. I was hiring homeless people to work with me at the auctions. There was always stuff left over. My initial idea was to take the stuff to Goodwill, but one of the homeless people asked to try to sell the leftovers. I provided the homeless with space to start a thrift store called Second Chance.

19. In January 2017, Akron was creating a freedom trail on city property. There were homeless people living in tents on the land the City intended to use for the freedom trail. On January 27, 2017, the City evicted the homeless people from the freedom trail land. Some of the homeless asked to stay in their tents in the backyard of 15 Broad. This is how the tent community began.

20. It was very interesting for me, as an entrepreneur, to see homeless people, who, by all stereotypes were lazy and useless, create a real community with rules, mutual support, and hope. I wanted to give the homeless people the opportunity to create a safe refuge from the harsh winter. It was awesome to witness, and it was a life-changing experience for one to just not say no and let something extraordinary occur.

21. We initially allowed campfires and we didn't prohibit alcohol consumption. This inspired a lot of people to congregate at 15 Broad. But this caused serious problems because people living there were trying to

quit drinking and wanted to live quietly. At that time, we lacked the trash and sanitation facilities we needed.

22. By March or April 2017, we stopped allowing drinking and fires. I also recognized that we needed to be more attentive to our neighbors.

23. When we first started, we had no agenda. 15 Broad was just a place for people to stay. But we soon recognized that there were homeless people who wanted to improve their lives. We decided to focus on being a place to help people move forward. By June or July 2017, so many homeless people wanted to stay at 15 Broad that we could gradually create more structure to identify the people who truly needed and would accept help. Only people who want to be part of a community and contribute to the community will want to stay and they are the only ones allowed to stay.

24. Residents must participate in drug and alcohol assessments and counseling. They must undergo a psychological evaluation. They must contribute at least one hour of work per day. They must abide by the community code of conduct.

25. This community is primarily run and operated by the homeless people who live there. I, as the executive director, make sure that everything they do is safe, respectful of one another and our neighbors, and consistent with the mission. Otherwise, they have created their own democratically elected Tri-Council and security team. We are now also implementing an

appeals board if people believe they have been wrongfully punished for breaking our rules.

26. My wife and I, along with other supporters, believed that the tent community would benefit from a more formal structure. In October of 2017, we formed a nonprofit corporation called The Homeless Charity, which is a 501(c)(3).

27. Each resident that stays with us is required to contribute 1 hour of work each day to the facility. The one hour jobs include things such as working in our clothing room, laundry, food pantry, kitchenette, yard, maintenance room, or doing general cleaning and organizing. A member of the Tri-Council assigns jobs each day.

28. Residents also must agree to abide by our written Code of Conduct, and we require them to sign the Code when they arrive. Our Code of Conduct was created by the homeless who live here. It is tweaked to meet new situations. But the fundamentals stay the same. Basically, it says you cannot do anything illegal and you cannot act out. Also at the top of this list is no drug use at all, no alcohol use on the premises, no being intoxicated on the premises, and no violence.

29. If someone violates the Code of Conduct, they are typically found out by someone on the security team. Residents also are subject to random drug tests and tent searches for drugs, drug paraphernalia, and any other illegal things. The offender is then reported to the Tri-Council. The Council then makes the decision of what the punishment should be. Punishments

can range from the loss of privileges (such as the privilege of coming inside the community room) for a set time all the way to expulsion from the community. In addition, if there is a serious infraction or a series of infractions, a resident must agree to a customized behavioral contract or they have to leave the community.

30. Our process for enforcing the Code of Conduct evolves over time to meet the needs of a growing community. For example, we recently felt like we wrongfully punished someone for stealing. To deal with that, we are now going to try an outside appeals board that will listen to the case and make a decision as to what needs to be done. This community continues to become more mature. The people in the community value it and respect the Code and the system of justice we have developed to enforce it.

31. People who show initiative are offered non-paid “staff” positions. These are a minimum of 4 hours a day. But most people in those positions work much longer. These are desirable positions, so people often want them. Staff positions include doing resident intake, security, supervising the clothing room, and yard and building maintenance. In my experience, a willingness to take on a staff position is a strong indication that a resident is growing capable of moving on to permanent housing. The willingness to work a staff position also demonstrates a commitment to the community and a commitment to the sort of responsibilities that people outside the homeless community have.

32. Tri-Council consists of three people. There are two men, one is a senior citizen and one is an African American veteran, and the other Tri-Council member is an older woman. These roles are taken very seriously. These three people have the power to evict people. That is a heavy burden, particularly in the winter. Many people that come to us have been kicked out of all other shelters. So when they get kicked out of our place, they are being abandoned on the street. Up until now, we have been electing people on the Tri-Council when someone steps down. But the three people on Tri-Council have been on for several months. We are now looking at holding elections every two or three months. We are not thinking there will be term limits at this point. But elections will make sure the community is being represented by people they have elected.

33. I, as the executive director, usually only step in to community management if I feel there is something illegal or unsafe happening. However, I am very much a part of the community. I currently run the food pantry. I am there Monday through Friday 9-5. I am free to make my opinion known on governance issues and I often do. And I do help shape the community in ways that I think are beneficial. For example, the idea of an appeals board was my idea because I became concerned that the Tri-Council was potentially wielding too much power without enough checks and balances. I brought the idea of an appeals board up at one of our two weekly mandatory community meetings. I asked the community to vote on the concept. 100 percent of the community wanted to try it. I do not feel the

Tri-Council would have relinquished that control on their own. I truly believe this community is representative of how early society was formed. You can see it sometimes move in an authoritarian / strong-man direction, perhaps in part because our residents often have challenging personal issues and there is sometimes interpersonal conflict. I sometimes feel like I need to help turn the ship a little bit back into more of a democracy. A democracy is what the people want. But those in power seem to prefer more of an authoritarian regime. And, understandably, a democracy is messy and authoritarianism is easier. But clearly a democracy is more preferred by the people and creates a greater buy in to the entire place.

34. The Homeless Charity's Board of Directors, which consists of six people, is primarily focused on mission and vision. They typically are not involved in day to day operations. However, board members are welcome to come be part of the Community and some do. I make a concerted effort to be as transparent with the board as I can.

35. I do not draw a salary. And Sage Rock, LLC asks The Homeless Charity to pay rent for the basement of 15 Broad only when there is money left over after serving the needs of the residents.

36. By focusing most of my time on Akron's Tent City, I have drastically reduced the amount of time I spend running Sage Rock LLC with my wife, who personally shoulders most of the responsibilities. Our

business revenue has shrunk by half due to my work with the tent community,

37. We were originally called “Second Chance Village,” but we recently changed our name to “Akron’s Tent Community.” A former homeless person who worked with us in our very early days registered the name “Second Chance Village” with the state of Ohio and as a nonprofit. Rather than fight him, as we have no desire to fight the poor and homeless, we chose to move away from the name. We now just describe ourselves as “Akron’s Tent City.”

38. That said, we are far from the first structured tent city in America. More innovative and progressive states are already adopting them and using them as transitional housing. Anything new causes waves with the status quo. This was true in the Civil Rights movement, the gay movement, and this homeless movement. People do not like change. But that does not mean we should avoid helping the oppressed because others feel uncomfortable. We recently settled with the Adkins family, the neighbor who was suing us for causing a nuisance. They owned the only-single family residential house near us. They now have publicly said that they are not against the homeless. That house will now be a place where our leadership can live.

39. Our next focus is on Annunciation Terrace. We want to improve our relationship with the residents there. I am very sympathetic to the concerns that senior citizens have about being safe and valued members of their community. Having said that, the fact of

the matter is the entire neighborhood is filled with transients and drugs. While we might be blamed for things, we are not always the culprits. We are very adamant that none of our people loiter in front of our building or anywhere on the sidewalk. When they go to the free meal at the Annunciation Church they are NOT permitted to cut through the Annunciation Terrace parking lot to get to the church. They must always walk all the way to the stop sign and turn left to get to the church. I am very serious about being a good neighbor. We want to correct the things we can, like prohibiting people from cutting through their parking lot, but we know that some of it is just hard feelings. There are two main people that are unhappy with us. As an example, one of them called the police on us this past weekend because we had gotten approval by the city to close the street for our first annual Middlebury Festival. This person didn't believe we should be allowed to have a festival. That cannot be right.

40. Right now we have three dogs at our facility (the maximum our lease allows other than service animals). We are having issues with these dogs barking. At our community meeting this week, the community agreed that we want to try to continue to allow dogs in the facility. But now dogs can get strikes for barking or not having their owner pick up their waste. Three strikes and the dogs will have to go. The community is very aware that they are a class of people society disdains. They are truly an oppressed, stereotyped class of people. So we are very diligent to try not to play into any stereotypes. A housed couple that yells or lets their

dog bark all day is different than one of our people doing that. We must be better. We realize that and we are serious about achieving that.

41. We have gotten two main grants so far. One for \$5,000 and another for \$2,000. We also sometimes get money for tents and sleeping bags. But the vast majority of our money comes from individual private donors. While not totally, we are getting very close to breaking even on monthly expenses. Any deficits have been covered by my family. We, very specifically, are not asking for any money from the city. We only want to be a solution for their very real problem of homelessness. And we are providing that solution very, very inexpensively.

42. In addition to providing a safe, supportive community, we take concrete steps to help our residents transition to permanent housing. A common problem is lack of government identification. Homeless people often arrive here without I.D. Without an I.D., people cannot sign up for many types of social services, including housing programs. We show people how to obtain a new I.D.

43. We also work with the police, fire department, other city departments, county health department, drug and alcohol counselors, mental health service providers, social workers, housing experts, volunteers from the wider Akron community, and anyone else who wants to join us to make our tent community as effective as possible at rescuing people and moving them to housing.

44. Transitioning to permanent housing is a process we are working on very closely with the Continuum of Care. Some in the homeless support community think we are letting people just rest on their laurels in their tents. That is absolutely not the case. We have no desire to allow people to set up long-term housing in a tent in the city. I would love it if not one homeless person in Akron ever had to spend a single night in a tent. That's my vision. This would include active alcoholics, drug users, sex offenders. Everyone. Imagine how amazing Akron would be if we had a place for every person in our community. No women living on the porches of abandoned homes. No children living in cars. No veterans living under bridges. It's an audacious goal. But the City says every homeless person can have a safe and clean home that needs it. I am reenergized to make that happen.

45. We are incredibly fortunate to have a large group of people that support us in many ways. Some people bring food weekly. Some people bring supplies regularly. Some just come to help regularly. If I have learned one thing about America during all of this I have learned that Americans don't want other Americans to suffer on the street homeless. There is an incredible public desire for society to fix this glaring wound in our country.

46. We are members of the Akron Canton Regional Food Bank. We give food to those that live with us and those in the surrounding community. The need for food is significant and real. I currently pick up food

App. 114

in my pickup truck once a week. I could easily go 2 or 3 times a week.

47. I wish I could provide more for the homeless and put them in structures that were more secure and temperature controlled. But I can't. Putting Americans in tents is embarrassing to me. But it is the thing I can do today.

Further Affiant sayeth naught.

/s/ Sage F. Lewis  
Sage F. Lewis

Sworn to and subscribed before me, this 6th day of July, 2018.

/s/ Rebecca J. Sremack [NOTARY STAMP]  
Notary Public, State of Ohio

My commission expires N/A - Attorney

---

**STATE OF OHIO**            )  
  ) **SS:**  
**COUNTY OF SUMMIT** )

I, Sage F. Lewis, of full age, being duly sworn according to law upon his oath deposes and says:

1. I am a citizen of the United States, a resident of the State of Ohio, and over 18 years of age. I make this affidavit based on my personal knowledge of the facts set forth and am competent to testify thereto if called as a witness at trial.

2. I understand that this affidavit is being made under oath, I understand the legal obligation to be truthful, and I will testify the whole truth based on my personal knowledge.

3. I first started allowing people to sleep in tents in the backlot of 15 Broad Street in January 2017, after the government evicted homeless people from public land to build the Freedom Trail.

4. I allowed them to pitch their tents in the backlot because it was winter and really cold. Fire Department staff told me that I cannot allow people to sleep inside because of rules related to occupancy and egress. So I did not allow people to sleep inside, but they were allowed to come inside to warm up in the basement while awake.

5. At the beginning, only a few people stayed in tents at 15 Broad Street. I'd estimate there was about one person the first month or so, which slowly grew over the next few months to about four people by April.

6. Word quickly spread among homeless Akronites that there was a safe place for them to sleep that was not one of the traditional shelters, and the community began to grow.

7. In addition to the tents, the entire downstairs level of the building at 15 Broad Street is devoted to providing services for the homeless and impoverished and is open during the daytime. I refer to it as the day center. The day center offers a lot of different resources. There are laundry facilities, a shower and several bathrooms, free clothing and blankets, desktop computers and wifi that people can use, and a pantry that is stocked with food from the Akron foodbank that people can take home to eat. We also have food that is prepared by volunteers and the homeless themselves for a hot, home-cooked meal. All of this is available for free.

8. The day center also provides help in obtaining government identification, applying for housing and social services, resources for addressing substance abuse and mental-health issues, and access to a community of people who understand the struggles of homelessness and seek to get past it.

9. One of the ways the day center provides that help is working with service providers and having them come directly to us where they can meet with several people in a row. I also meet with service providers to see how I can help get people into housing from a broader perspective. I started these meetings around January 2018, and have met with homeless service

provider representatives, such as housing providers and addiction recovery groups.

10. Starting in 2017, we required people staying with us to get mental health assessments and get on a waiting list for indoor housing.

11. As the tent community grew, we implemented rules and structure. We eventually formed a 501(c)(3) organization called The Homeless Charity to oversee the community and focus on its mission to help those in need.

12. I was unhappy with the strife with Annunciation Terrace and worked to improve our relationship with its residents. While I recognize there is only so much that I can do, we have worked over the years to respond to their concerns and try to peacefully coexist. I wish to continue to do that and minimize impacts to the residents of Annunciation Terrace while also providing services for the impoverished Akronites who need them.

13. At the peak of the tent community, there were a maximum of 45 tents.

14. I do not envision there ever being that many tents again because we continue to acquire more indoor shelter, because our relationships with other social-service providers continue to develop, and because we are getting better at getting people indoors.

15. In April 2018, I applied for a conditional-use permit so that I could get the city's formal permission to have tents in the back lot of 15 Broad Street. That

permit was denied in September 2018, and I have appealed that denial to the Ohio courts.

16. In July 2018, The Homeless Charity purchased 85 Kent Place, a single-family house directly next to the northern tip of the backlot behind 15 Broad Street.

17. Akron's zoning code limits the number of people who can live in 85 Kent Place to five unrelated people. The house can hold more than that, however, so we have applied for a conditional-use permit to allow up to ten unrelated people to live in the house. That permit application is pending, though the Planning Department just recommended the application be approved.

18. The Homeless Charity is constantly on the lookout for houses that meet our modest budget and that we could turn into more shelter housing. For instance, we are currently negotiating with the owner of a building up the road from 15 Broad Street and hope that we can come to an agreement soon to allow people to live there. We also are seeking to use the county landbank to obtain and rehabilitate nearby abandoned property that could shelter more people.

19. As we have worked toward obtaining more property and providing services to the homeless, we have learned a number of lessons and established a host of relationships that we will tap going forward as we continue our work.

20. In June 2018, I started attending monthly meetings with the Continuum of Care to work to get specific residents of the tent community housed. In September 2018, all homeless stakeholders in Akron—us, the Mayor and his staff, the providers who are part of the Continuum of Care, and the homeless themselves—launched an intense push to get each tent-dweller housed or into a shelter by Thanksgiving. We met weekly to discuss each person on the list, and we made tremendous headway in getting people into housing. I believe this demonstrates everyone’s commitment to housing the homeless and what can be accomplished if we continue to make housing the top priority.

21. Some people are harder than others to get into housing. Convictions, mental health challenges, and histories of substance abuse present real obstacles to getting people housed.

22. The fact that we have indoor housing available for a few people needing help has been extremely valuable. For instance, we knew one man would be nearly impossible to find temporary housing through the traditional route because of his criminal convictions. We were able to house him at 85 Kent Place, where he is settling in and doing well. We were very grateful that we did not have to turn him out to the streets.

23. As Thanksgiving approached, we discovered that we did not have to move everyone out by then. While we were grateful, we continued our earnest push

to get tent residents into housing as the winter approached. We had also heard rumors that we would have to move everyone out by early December, so we continued working very hard.

24. On December 7, 2018, I received a notice of violation/order to comply that demanded I move everyone out and remove all tents and related materials by January 5, 2019. The letter threatened administrative penalties and prosecution if I failed to comply.

25. We will comply with the notice of violation/order to comply, and by January 5, 2019, all of the tents and related materials will be gone. I do not want to be subjected to the financial penalties or prison time.

26. After the fall 2018 push to get people into housing, there were about five people left living in tents behind 15 Broad Street. We are working on getting them all into shelters. Thankfully, it has been easier to get people into shelters as we have been approaching winter. Some of the shelters have reduced some of their strict requirements, and some have expanded their capacity by allowing people to sleep on mats on the floor.

27. While this isn't an ideal situation. I am grateful people have somewhere to go at the moment. I worry, however, that this won't last. The added capacity and eased requirements in the shelters are just a temporary measure and will be withdrawn as the weather improves. When they revert back to their standard capacity and rules, there will be fewer temporary

## App. 121

housing options available and too many people for the available beds.

28. The Continuum of Care is no longer working with me as part of the fall 2018 push and has said instead that the homeless will have to rely on the City's 211 process. United Way runs 211, and it provides a variety of options for people who are becoming homeless or in the process of getting housing. Unfortunately, the system is large, complicated, and slow. One time I called in, it took me four or five hours to get on the phone with someone. That person then told me that while I can work with them to get someone on a waiting list for the women's shelter, for example, I should just call Haven of Rest directly to get a person staying in that shelter. But Haven of Rest says that people need to call 211, so it's difficult to know what the best route is.

29. The other housing options require all three forms of identification (birth certificate, driver's license, and social security card), and a person cannot get housing without all three. Some of the options require fingerprinting or orientations that are held a few times each month.

30. The system is often working with private landlords, who can be difficult in accepting new residents. I've heard of people getting turned away from housing based on their past activity or convictions. I don't fault the service providers, but it's a convoluted and daunting system. I imagine many people don't go through it.

31. If a person is in need of immediate shelter, calling 211 is unlikely to provide that. It takes time to house people through the 211 process, and they will need somewhere to stay in the meantime.

32. We at The Homeless Charity are really focused on obtaining new indoor housing options, as I described above. But that process takes time, and our current indoor housing options are full. I do not want to have to turn people away who are in desperate need of somewhere to stay.

33. I want to have the option of erecting a tent in the backlot of 15 Broad Street as emergency shelter to someone who has no realistic alternative to the streets. I view tents as a last-ditch, emergency shelter better than pushing someone out on the streets, where they face danger. Tents are not an appropriate, long-term solution for homelessness. I would only allow someone to sleep in a tent at 15 Broad Street if the rest of our indoor housing options are full and no other indoor housing option is viable. I would not allow people to stay there for a long time, but just until they can get to an indoor shelter.

Further Affiant sayeth naught.

/s/ Sage F. Lewis  
\_\_\_\_\_  
Sage F. Lewis

App. 123

Sworn to and subscribed before me, this 21st day  
of December, 2018.

/s/ Rebecca J. Sremack

Notary Public, State of Ohio

My commission expires N/A - Attorney

[NOTARY STAMP]

---

**STATE OF OHIO**            )  
  ) **SS:**  
**COUNTY OF SUMMIT** )

I, Lerryn Campbell, of full age, being duly sworn according to law upon her oath deposes and says:

1. I am a citizen of the United States, a resident of the State of Ohio, and over 18 years of age. I make this affidavit based on my personal knowledge of the facts set forth and am competent to testify thereto if called as a witness at trial.

2 I understand that this affidavit is being made under oath, I understand the legal obligation to be truthful, and I will testify the whole truth based on my personal knowledge.

3. I am on the board of the Homeless Charity & Village. I am a homeless advocate. I am here at the tent city several days a week, providing rides for folks to get to their appointments and field any questions that the tri-council might have.

4. The tri-council are people who live in the tent city that interview prospective members, ensure that rules and regulations are being followed, and run community-wide meetings on Tuesday and Fridays. They are the governing body of the charity. It is self-governed, so the tri-council takes care of the day to day operations. Tony, Mary, and Herman are the current members of the tri-council. The members of the village vote for their tri-council members.

5. The board takes care of legal and financial matters. We work on development, public relations, and fundraising. The board meets monthly. We used to meet quarterly but now things are picking up and we have more to do. We are having to meet more frequently because we are getting more and more residents as time goes on.

6. There are currently six members on the board of The Homeless Charity, including myself and Sage Lewis. Jim Orenga is a member of our board as well as the board of the Peter Maurin Center. Jim Eberly starting doing AA meetings for us—he is now our newest board member. Deborah Monaco, another board member, is a long-time friend of Sage's and is a local business owner. She is also a former attorney. Rocky Lewis is also a board member.

7. The Peter Maurin Center is another charity organization that helps the homeless. They sponsor our port-a-potties and dumpsters.

8. Jim Orenga is also the treasurer of the organization and manages all the finances.

9. The AA meetings that Jim Eberly puts on are open to the public. Jim holds them twice a week.

10. We applied to be a food bank distributor. Sage Lewis went to classes at the food bank, so now we are an official food bank pick-up spot. So anyone in the community at large that meets the requirements for the income threshold can come here and pick up food. Sage is in charge of the food bank.

11. We get food from a variety of sources. The food bank gets day-old bread from Panera on Friday. On Tuesdays, we get direct donations from Brueggers Bagels. Impact 330 does BBQ dinners for our residents. Whole Foods also drops off donations. Eva, a private member of the community, also comes every Tuesday to bring home-cooked meals for the residents.

12. The ultimate goal here is to have this place serve as a transition into more traditional housing. We get people ID's, help them manage their doctor appointments and take them to the appointments, and encourage them to utilize services in the community. We take them as they are, show them what they need to do, and support them as they take those next steps towards a better life.

13. Upon intake, all the residents are required to sign up for Home Again. They also must show that they are moving forward in their life—whether that's treatment, looking for a job, or going to meetings.

14. Often, people's first steps are just walking right upstairs and meeting with Will VanDyke. He works for Urban Ounce of Prevention and serves as someone in-house that residents can initially go to for help. He helps people start treatment plans and sets them up with whatever meetings they may need to utilize. He sets people up with AA meetings, mental health plans, and physical health plans. Portage Path is the sliding-scale mental health facility we send people to.

15. What's different here compared to other homeless charities is that this isn't just a charity, this is a community. The residents' self-esteem and sense of self seems to grow here every day. Having the responsibility to work one hour per day forces people to act more like a family rather than just acting like strangers inside a building. This place only exists because everyone comes together, and all the pieces of the puzzle are crucial to its success.

Further Affiant sayeth naught.

/s/ Lerryn Campbell  
Lerryn Campbell

Sworn to and subscribed before me, this 6th day of June, 2018.

/s/ Rebecca J. Sremack [NOTARY STAMP]  
Notary Public, State of Ohio

My commission expires N/A - Attorney

---

App. 128

[SEAL] **DEPARTMENT OF PLANNING**  
DANIEL HORRIGAN, **& URBAN DEVELOPMENT /**  
MAYOR 166 S. High Street / 405 Municipal  
Building / 44308  
Jason Segedy, Director /  
Michael Antenucci, Zoning Manager /  
330-375-2350 / FAX: (330) 375-2438

6714282

PPN

2018-22975

CASE #

December 6, 2018

Sent via Regular U.S. Mail & Certified Mail

Sage Lewis, LLC	Sage Lewis, LLC	Sage Lewis, LLC
15 Broad Street	c/o Sage Lewis,	72 N. Pershing Ave
Akron, OH	statutory agent	Akron, OH
44305	72 N. Pershing Avenue	44313
	Akron, OH 44313	

**CERTIFIED** Property Location: 15 Broad Street,  
**RETURNED** Akron, Ohio

**NOTICE OF VIOLATION/ORDER TO COMPLY**

153.240F: Use Restrictions in a Single-Family Residence  
Use District

***The operation of a campground is not  
permitted in a residential use district.***

Discontinue the illegal use(s) and/or violation(s) of this  
property **within 30 days of the date of this letter.**  
Cease all use of the premises as a campground and  
permanently remove all tents, equipment, and

App. 129

miscellaneous material related to the illegal use of the premises as a campground.

Failure to comply with this order may result in administrative penalties being imposed pursuant to the City of Akron Zoning Code Sections 153.150(B) and 153.199(A-E). In addition, failure to fully comply with this order may result in your prosecution pursuant to the City of Akron Zoning Code Sections 153.150 and 153.199(D) & (E).

Pursuant to Section 153.418, "Right of Appeal", of the City of Akron Zoning Code, you do have the right to appeal this order to the Board of Zoning Appeals within twenty (20) days of the service of this notice. Appeals of any Order-to-Comply with the City of Akron Zoning Code must be filed by written application containing all the information required by Section 153.420 of the City of Akron Zoning Code, along with a non-refundable fee of \$75.00, with the Board of Zoning Appeals through the Zoning Division located in the Municipal Building Room #405, 166 S. High Street, Akron, OH 44308. Checks should be made payable to the City of Akron. An appeal application may be obtained by contacting the Zoning Division at (330) 375-2350.

Sincerely,

/s/ KAREN E. PATEOS  
City Planner IV

App. 130

cc: Diane Bair  
Councilperson Zach Milkovich, Ward 10  
7017 2680 0000 0804 1879

---

**MINUTES OF THE AKRON BOARD  
OF ZONING APPEALS**

**MEETING OF JANUARY 30, 2019**

**A MEETING OF THE AKRON BOARD OF ZONING APPEALS WAS HELD ON WEDNESDAY, JANUARY 30, 2019, IN CITY COUNCIL CHAMBERS, THIRD FLOOR, MUNICIPAL BUILDING, 166 SOUTH HIGH STREET. THE MEETING BEGAN AT 8:35 A.M. AND ADJOURNED AT 10:00 A.M.**

**BOARD OF ZONING  
APPEALS MEMBERS  
PRESENT:**

Melinda Scalfaro,  
Chairperson  
Sara Avalos,  
Vice Chairperson  
Bruce Bolden  
Perry Clark  
Candice Eberhardt

**DEPARTMENT OF  
PLANNING AND URBAN  
DEVELOPMENT STAFF  
PRESENT:**

Jason Segedy,  
Planning Director  
Mike Antenucci,  
Zoning Manager  
Jim Hosbach, City Planner  
Karen Pateos, City Planner  
Mike Meyer, City Planner  
Elizabeth Denholm,  
Recording Secretary  
Helen Tomic, Capital  
Planning Manager

**OTHERS PRESENT:**

John York, Law Department  
Brian Angeloni,  
Law Department  
Brian Bremer,  
Law Department

App. 132

Ellen Lander-Nischt,  
Mayor's Office  
Veronica Simms,  
Council-at-Large

**PUBLIC NOTICE HAVING BEEN GIVEN OF THE PUBLIC HEARINGS TO BE HELD BY THE BOARD OF ZONING APPEALS ON WEDNESDAY, JANUARY 30, 2019, THE BOARD PROCEEDED AS FOLLOWS:**

**THE SWEARING IN OF PUBLIC SPEAKERS.**

**THE BOARD UNANIMOUSLY APPROVED THE MINUTES OF DECEMBER 19, 2018.**

**APPEAL #24-2018-Z**

**APPELLANT:** Sage Lewis, LLC, and  
The Homeless Charity, LLC  
**PREMISES:** 15 Broad Street  
**REQUESTED:** Appeal of the Order to Comply regarding the operation of a campground in a residential use district and request for a variance

**REASON OF SUPERINTENDENT OF BUILDING INSPECTION FOR ISSUING AN "ORDER TO COMPLY":**

**SECTION 153.426**

An appeal of the Superintendent of Building Inspection's "Order to Comply" is heard by the Board of Zoning Appeals under Section 153.418 of the Zoning Code.

**REASON OF SUPERINTENDENT OF BUILDING INSPECTION AND REGULATION FOR REFUSING TO GRANT PERMIT REQUESTED:**

**SECTION 153.240(F)**

Variance of the Zoning Code requires the approval of the Board of Zoning Appeals under Section 153.404(A)-(X).

**DEPARTMENT OF PLANNING AND URBAN DEVELOPMENT PRESENTATION:**

**MS. PATEOS PRESENTED THE FOLLOWING REPORT AND RECOMMENDATION:**

Appellant Sage Lewis, LLC, is the owner of property located on the east side of Broad Street, south of Kent Street, addressed as 15 Broad Street (the "Property"). Appellant The Homeless Charity, LLC, represents that it is a lessee of the Property. The front of the Property is zoned Retail Business Use District (U3, H3, A4) and contains a retail building. The rear of the Property is zoned Single Family Residence Use District (U1, H1, A1), in accordance with the Land Use and Development Guide Plan. The Property contains 24,966 square feet of area. Surrounding uses are Annunciation Terrace Apartments and a single-family residence to the north, residential to the north, Ardmore, Inc., to the south, Vulcan Machine to the east, and Middlebury Commons (under construction) to the west.

**Appeal of December 6, 2018**  
**Notice of Violation/Order to Comply**

The Appellants are appealing a Notice of Violation/Order to Comply with the City of Akron Zoning Code, Section 153.240(F) Use Restrictions in a Single Family Use District (the “Order”), issued on December 6, 2018. The Order was issued based on the campground at the Property on that date, and the campground did not cease operation until January 4, 2019. A campground is not a permitted use in a Single Family Use District, according to Section 153.240(F). The Appellants were denied a Conditional Use (PC-2018-30-CU) request by City Council on September 17, 2018, to retain the campground at the Property. As such, the Property was not in compliance with Section 153.240(F) Use Restrictions in a Single Family Use District (U1, H1, A1) because the property contained a campground at the time the Order was issued. For the foregoing reasons, Planning Staff recommends the Board determine that the Order was proper.

**Appellants’ Request for a Variance**

The Appellants also seek a variance. However, the requested variance should not be granted for multiple reasons: First, it is for a campground, which is not harmonious with the surrounding land use. Second, the requested variance also does not meet the conditional use requirements of Sections 153.474 and 153.476. Third, the requested variance also does not fall within the Board’s authority to grant a variance provided for in Section 153.404. Planning Staff also notes that, even

if the deficiencies were not present, Appellants' variance is vague and lacks the requisite detail necessary for approval. Planning Staff recommends this Board deny Appellants' requested variance.

**The Board's Authority to Grant a Variance**

Section 153.404 states that "the Board of Zoning Appeals may, on appeal in a specific case, after public notice and hearing, vary the application of certain of the regulations established in this Zoning Code in harmony with their general purpose and intent." "These variances shall be authorized only when the Board finds adequate evidence that they will meet the criteria set forth in §§ 153.474 and 153.476." The authority of the Board of Zoning Appeals to grant a variance, however, is limited to specific circumstances set forth in Section 153.404(A)-(X).

**The Requested Variance Does Not Satisfy the Requirements of Sections 153.474 and 153.476.**

The Planning Commission and City Council previously determined that a campground at the Property does not satisfy the conditional use requirements of Sections 153.474 and 153.476 based, in part, upon the recommendations of the Planning Staff's report. The same conclusion is warranted regarding the variance request.

First, in accordance with Section 153.474(A) the proposed use must be "harmonious with and in accordance with the general objectives of the City's Comprehensive Plan." One stated goal of the City's

Comprehensive Plan is to “preserve and protect single-family residential neighborhoods.” Tents are not a safe or healthy form of housing, nor do they conform with the general expectation that properties zoned for single-family use will consist of a single, habitable, residential structure.

In accordance with Section 153.474(B) the proposed use must be “designed, constructed, operated, and maintained so as to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity” and “not change the essential character of the same area.” Outdoor tents assembled in a campground or tent community configuration in a rear yard in a residentially zoned area—adjacent to an apartment building, which has a “bird’s eye” view of the tents and other personal property on the lawn—is not harmonious or appropriate in appearance with the existing or intended character of a residential neighborhood.

In accordance with Section 153.474(C) the proposed use must not be “hazardous or disturbing to existing or future neighboring uses.” When Appellants previously operated the illegal campground on the Property, it resulted in numerous complaints from neighboring properties regarding offensive conditions, as set forth above, which indicate that the proposed use is currently and would continue to be hazardous and/or disturbing to existing or future neighboring uses.

Additionally, in accordance with Section 153.474(E), the proposed use must not “create excessive additional

requirements at public cost for public facilities and services” and not be “detrimental to the economic welfare of the community”. The proposed variance presents a risk of harm to the economic welfare of the community due to the offensive conditions. Neighboring property owners have complained of detrimental economic effects directly related to the proposed land use, which are at risk of recurring at existing and future businesses and residences (e.g., Middlebury Commons) throughout the vicinity. Allowing a campground at this location would risk irreversible damage to the economic welfare and quality of life of the neighboring properties.

**The Requested Variance Does Not Fall Within the Authority to Grant a Variance Set Forth in Section 153.404.**

The Board’s authority to grant a variance is set forth Section 153.404(A)-(X). Appellants suggest that this Board has authority under Section 153.404(I) to grant the variance. However, Appellants variance request does not fall within the scope of Section 153.404(I), which requires a variance be “in general keeping with, and appropriate to, the uses authorized” in the district. A campground is not in general keeping with a single-family residential use district. Furthermore, the request for tents is specifically prohibited by the Zoning Code.

**This Board Should Deny the Variance Request**

Akron’s Zoning Code permits but does not require the Board to grant a variance even if the requested

variance meets the requirements of Section 153.404. However, in this case, the Appellants have not met the variance criteria in Section 153.404 and the request should be denied.

The Planning Staff, in accordance with Section 153.426, recommends the Board of Zoning Appeals **AFFIRM** the Order to Comply regarding a campground at 15 Broad Street and **DENY** the request for a variance.

**PROPONENT**

Rebecca Sremack, attorney representing the Homeless Charity and Village, 3433 E. Tuscarawas Extension, Barberton, Ohio, spoke in favor of the appeal. She stated that the Homeless Charity and Village complied with the January 5<sup>th</sup> deadline imposed by the Order to Comply. She asked the Board to consider giving time for additional study if they were not prepared to approve the variance on this day. They submitted 1300 pages of documentation addressing several points that were raised in the Planning Commission's recommendation. They would like to begin a dialog with the Board about how the Homeless Charity and Village can fit into the Middlebury and Broad community.

Sage Lewis, Executive Director of the Homeless Charity, owner of 15 Broad Street, spoke in favor of the appeal. He stated that they have worked with people from the Continuum of Care and other agencies to re-integrate the homeless back into society. He stated that they are trying to start a conversation, to answer questions, to provide experts who are running tent

villages in other cities. He suggested setting a time limit on how long a person can be in a tent, drastically limit the number of tents, make them invisible to any neighbor, have a one-year variance with key performance indicators so they can present the results, and make tents more uniform and harmonious. He stated that they have met the January 5<sup>th</sup> deadline to comply. They removed two 40 yard dumpsters of trash. The fire inspector was there yesterday, and the head fire inspector was coming today.

The following spoke in favor of the appeal:

Nicky Sutcliffe, 424 Merriman Road, Akron.

Brenda Hupfer, 1269 McIntosh Avenue, Akron.

Laurie Beal, 406 N. Lyman Street, Wadsworth, Ohio.

Sandy Zee, 2374 Eastlawn Avenue, Akron.

Ashleigh Hughes, no address given, Tallmadge, Ohio.

### **OPPONENT**

Keith Stahl, Director of Operations of Community Support Services, and board member of Continuum of Care, 15 Cross Street, spoke against the appeal. He stated that homelessness has not been resolved in communities that have enacted legislation that allows for tents, such as Seattle. He stated that the previous day he participated in the annual count of homeless individuals living out on the street, and there were no individuals in any of the various tent campsites in the woods. Due to the extreme weather, these individuals had gone to the Haven of Rest, to family, or to friends.

Mr. Stahl stated that the week prior they were active camps, and they will be active again once the severe weather passes. The tents in the woods and remote areas have not been eliminated. He stated that they have developed lots of Housing First options, including the 68-unit Stoney Pointe Commons.

Ms. Beal stated that the previous day she personally brought supplies to four individuals who were staying at a campsite; they were afraid their property would be stolen or the campsite shut down if they left.

Ms. Eberhardt asked if there were any numbers as far as how many people have transitioned back into society from the Homeless Charity and Village.

Mr. Stahl replied that there were initially 46 individuals identified to be housed. Around 20 individuals got into permanent supportive housing, 12 or 13 went into the rapid-rehousing program Home Again, a couple individuals were reunited with family or friends, and five either went to jail or were asked to leave the community due to violations. He stated they will continue to work with them once they get out of jail.

Mrs. Scalfaro stated that the Board has a limited scope of what it can do. Mr. Lewis went through the Conditional Use process with City Council, which would be more in line with what would need to be done to allow tents. It does not seem that the variance as it is presented really falls within the Board's jurisdiction, to be able to allow something like this to continue on the property.

App. 141

Mr. Bolden stated that the Zoning Code Section 153.404 sets out what the Board can and cannot do. Section 153.474 talks about whether they can grant zoning that is harmonious to the Zoning Code, in the general nature of the Zoning Code. He stated that he did not know how they could grant an appeal which was beyond their jurisdiction.

Mrs. Scalfaro asked if there was anything within the 14-page summary that was not addressed.

Mr. Antenucci replied that what the Board had is what the Planning Staff could provide at this point.

Mr. Bolden stated that Attorney Sremack asked if the Board could take time, but he does not see how that would help. They would need to change the zoning code, which would have to be done through City Council or through referendum and going to a vote.

Mr. Antenucci requested that there be a vote to affirm or deny the Order To Comply. There would also be a vote to grant or deny the variance request for tents for emergency purposes.

Brian Angeloni, Law Department, apprised the Board that granting the request for variance is discretionary, and certain requirements have to be met. They would need to make a finding that the proposed use is in harmony with the general intents and purposes of the applicable building regulations. They would need to find adequate evidence that all of the requirements under the Conditional Use standard were met. They would need to find that the use is not otherwise specifically

prohibited by the Zoning Code. They would also need to find that the use would be appropriate to the uses authorized in a single-family residential zoning district. He stated that the Board needed to make those specific findings in order to be able to approve the variance.

Mr. Bolden stated that it appears that the variance is not in harmony with the general purpose and intent of the zoning code in a single-family residence use district.

Mr. Antenucci agreed that it was not in general keeping with an appropriate use as authorized, and does not fall under that section of the Zoning Code that would put this under the Board's jurisdiction.

### **CONCLUSION**

The Board, under authority of Section 153.426 of The Code of Ordinance, upon motion duly made, **MOVED** BY Mr. Bolden and **SECONDED** by Mrs. Avalos that the Board of Zoning Appeals **AFFIRM** the Superintendent of Building Inspection's Order to Comply at 15 Broad Street.

**RESOLVED**, That Appeal #24-2018-Z of Sage Lewis, LLC, and The Homeless Charity, LLC, regarding the operation of a campground in a residential use district at 15 Broad Street be, and the same is hereby **DENIED**.

<b>THE VOTE:</b>	<b>Bolden</b>	<b>Aye</b>
	<b>Avalos</b>	<b>Aye</b>
	<b>Scalfaro</b>	<b>Aye</b>
	<b>Clark</b>	<b>Aye</b>
	<b>Eberhardt</b>	<b>Aye</b>



**U.S. CONST. AMEND. XIV**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously

taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

---

App. 146

Akron, OH Code of Ordinances

(July 31, 2018 Version)

153.404 - Jurisdiction—Variances.

The Board of Zoning Appeals may, on appeal in a specific case, after public notice and hearing, vary the application of certain of the regulations established in this Zoning Code in harmony with their general purpose and intent. These variances shall be authorized only when the Board finds adequate evidence that they will meet the criteria set forth in §§ 153.474 and 153.476. The Board may enact sufficient and reasonable conditions and safeguards as it may deem necessary to assure the proper development of the variances consistent with its powers. The Board's jurisdiction shall be limited to the following instances, wherein the Board may authorize the issuance of a permit for:

- A. The location or erection, in any part of a Class U1 District, of a building which is arranged, intended or designed for a use enumerated in § 153.240(A)(3);
- B. The extension of a building or use into a more restricted district, but not more than twenty-five feet beyond the boundary line of the district in which such use is authorized, where a use district boundary divides a lot in single ownership;
- C. The expansion of a structure or construction of a new structure on premises devoted to a nonconforming use, where the cost of such expansion during any ten-year period does not exceed sixty percent of the value at which the

App. 147

existing structure stands on the tax duplicate, or the value of the structure as determined by an appraisal, such appraisal to be obtained by the method described in § 34.28, nor in any one-year period to an extent exceeding thirty percent of such value, and together with such conditions as the Board may deem appropriate to minimize the nonconforming character of the use;

- D. The extension of a nonconforming development to an extent in excess of the cost limitations of § 153.397(B), together with such conditions as the Board may deem appropriate to minimize the nonconforming character of the development;
- E. The temporary erection or temporary placement of structures or the use of structures and premises in all districts, that do not conform to the regulations of such districts, for a period of not more than two years, where such structures are temporary only and uses are clearly incidental to and necessary for appropriate development. Such structures shall not be used nor be intended to be used for habitation and shall be approved by the Superintendent of Building Inspection and the Fire Chief before placement on the site.
- F. The location of a church in a Class U1, U2, UD, UHD, or ULB District, provided such use furnishes off-street parking based on the following criteria:
  - 1. The minimum requirements shall be one parking space for each five seats in the

App. 148

largest meeting room of the building, such largest meeting room including all space created by opening temporary partitions to consolidate space.

2. Such parking space shall be provided either on the lot of such use, or under the provisions of subsection H of this section, or within a use district where off-street parking is a permitted primary use.
  3. The Board, when reviewing the plans for such parking space, shall be guided by the standards provided in the article on Development and Area District Requirements at § 153.300 et seq. for the appropriate use district in which the parking is located.
  4. If an existing church is expanded, parking space required hereunder shall be based only on any increased seating capacity.
  5. A church, if moved to a new location or built on the site of a formerly existing similar use, or creating a new largest meeting room, shall comply with this subsection.
- G. The location of a rest home, nursing home, or convalescent home (not including rehabilitation homes or half-way homes) in a Class U1, U2, UD, UHD, ULB, or U3 District, provided that such use will not contain over ten patients or residents and provided that such use

App. 149

furnishes off-street parking based on the following criteria:

1. The minimum requirement shall be two parking spaces for each five residents or patients in the facility, plus one parking space for every two full-time employees.
  2. Such parking space shall be provided either on the lot of such use, or under the provisions of subsection H of this section, or within a use district where off-street parking is a permitted primary use. The Board may also authorize parking on adjacent lots shared with other uses.
  3. The Board, when reviewing plans for such parking space, shall be guided by the standards provided in the article on Development and Area District Requirements at §§ 153.300 et seq. for the appropriate use district in which parking is located.
  4. If an existing nursing home, rest home, or similar institution is expanded, parking space required hereunder shall be based only on any increased capacity.
- H. The location of off-street parking facilities for motor vehicles in a Class U1, U2, UD, UHD or ULB District, where such parking is accessory to facilities of a church, hospital, or similar institutional use, nursing home, rest home, non-profit lodge, or eleemosynary organization, subject to the following criteria:

App. 150

1. The lot used for off-street parking shall be within four hundred feet of the premises of operation or activity of the organization or institution requesting such parking.
  2. No charge shall be made for the use of such parking facilities except as a means to control their use and provide for their maintenance.
  3. The organization or institution requesting such parking facilities shall not be engaged in the dispensing of alcoholic beverages to members or guests.
  4. The Board, when reviewing plans for such parking area, shall be guided by the standards provided in §§ 153.300 et seq. for the appropriate use district in which the parking is located.
- I. Any use in any use district that is not specifically prohibited and that is in general keeping with, and appropriate to, the uses authorized in such district;
  - J. Any public utility structure, building, or use in any district where not otherwise permitted where necessary for the public convenience and welfare;
  - K.
    1. The erection of a building or structure to a height in excess of that prescribed for the height district in which such building or structure is located, but not in excess of the height prescribed in the next less restrictive height district, where such

App. 151

variance is necessary for the appropriate development of the property;

2. An accessory structure, beyond the height limitation of fifteen feet, but in no case shall the Board permit construction to exceed five feet in height beyond the fifteen-foot height limitation, except that no habitable space shall be permitted.
- L. The construction of a structure or building beyond the building line, but in no case under this subsection shall the Board permit construction to extend closer to the street line more than seventy-five percent of the distance between the building line and the street line;
  - M. The use of property in a U4, U5, or U6 Use District for residential purposes, provided there is at least fifty percent residential development on the side of the street in the block in which the proposed use is to be located;
  - N. The use of property in a U5 or U6 Use District for retail business purposes, provided there is at least fifty percent retail business development on the side of the street in the block in which the proposed use is to be located;
  - O. The construction of a building or portion of a building between the side yard line and the lot line, but not to exceed the following limitations:
    1. Not to exceed six inches variance on the narrow side yard for the foundation wall only;

App. 152

2. Not to exceed twenty-four inches on the wide side yard of a lot if eight feet remains for a driveway after the variation is granted;
  3. Such side yard variances permitted in subsections (O)(1) or (2) of this section shall not be allowed on a lot on which any variation allowing a reduction in the rear or front yards is permitted;
  4. Chimneys not to exceed thirty inches into the required side yards.
- P. For a single-family residence only:
1. The construction of or addition to a dwelling between the rear yard line and the lot line, shall not consume more than forty percent of the required rear yard area nor be closer than ten feet to any dwelling on an abutting property;
  2. No dwelling may be located closer than two feet to any side lot lines and no closer than ten feet to any dwelling on an abutting property; provided that the front, rear, and sides of said encroachment remain totally open, except that it may be roofed.
- Q. Where the Board is satisfied that the location, nature or uniqueness of the use makes a variance appropriate, fifty percent of the required parking area may remain unimproved and retained in landscaped area;

App. 153

- R. The location of a helistop in any district where such use will not be detrimental to the safety or welfare of the surrounding neighborhood;
- S. The location of a two-family dwelling, rooming house, or over five roomers, fraternity, or sorority house, or an apartment house on a lot smaller than that prescribed in § 153.305(B)(2), provided that not more than a ten percent reduction in either the area, building line width, or rear line width may be granted for any one lot, but not more than one such exception;
- T. The location of a residential day care center for seven to nine children in a Class U1 or U2 District, subject to the following criteria:
  - 1. Extra parking spaces shall be required only if the operator hires employees.
  - 2. Drop-off and pick-up areas shall be approved by the Traffic Engineer prior to Board of Zoning Appeals approval.
  - 3. Annual inspection and approval by the Building, Health, and Fire Departments.
  - 4. That only one day care center be permitted per City block or within one thousand feet of another day care center.
- U. The Board of Zoning Appeals may vary the underground wiring requirements where it finds undue hardship due to exceptional topographic or other physical conditions. It may vary the regulations so as to relieve such hardship, provided such relief may be granted without detriment to the public interest and

without impairing the intent and purpose of this regulation or the desirable development of the neighborhood and community. In order to grant a variance the board shall determine:

1. The lands are not conditionally zoned; if they are, no variance would be granted;
  2. That special conditions and circumstances exist which are peculiar to the land, structure, or building involved;
  3. That literal interpretation of the provisions of §§ 153.305(D)(4)(c) and 153.310(C) would deprive the appellant of rights commonly enjoyed by other properties in the same district:
  4. That the special conditions and circumstances did not result from the actions of the appellant;
  5. That granting the variance requested will not confer on the appellant any special privilege that is denied other developments in the same district.
- V. The location of accessory off-street parking for apartment houses on adjacent property in a more restrictive residential use district in areas where The Land Use and Development Guide Plan recommends mixed-residential use subject to the development conditions of § 153.305.
- W. The location of accessory off-street parking for nonresidential use on more restrictive zoned land in areas of the City where such a policy

App. 155

is recommended by The Land Use and Development Guide Plan subject to the development conditions of § 153.310.

- X. The location of a mausoleum in an existing cemetery. Penalty, see § 153.199.
-

App. 156

Akron, OH Code of Ordinances

(July 31, 2018 Version)

153.474 - General standards applicable to all conditional uses.

The planning staff, the City Planning Commission, and Council, when studying a petition for a conditional use, shall review the particular facts and circumstances of each proposed use in terms of the following standards, and if taking favorable action on the proposal, shall find adequate evidence that the use:

- A. Will be harmonious with and in accordance with the general objectives of the City's Comprehensive Plan;
- B. Will be designed, constructed, operated, and maintained so as to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity and will not change the essential character of the same area;
- C. Will not be hazardous or disturbing to existing or future neighboring uses;
- D. Will be served adequately by essential public facilities such as highways, streets, police and fire protection, drainage structures, refuse disposal, water and sewers and schools; or that the person or agency responsible for the establishment of the proposed use shall be able to provide adequately any such services;
- E. Will not create excessive additional requirements at public cost for public facilities and

App. 157

services, and will not be detrimental to the economic welfare of the community,

- F. Will not involve uses, activities, processes, materials, equipment, and conditions of operation that will be detrimental to any person or property or the general welfare by reason of excessive production of traffic, noise, smoke, fumes, glare, or odors;
  - G. Will have vehicular approaches to the property which shall be so designed as not to create an interference with traffic on surrounding public streets or roads;
  - H. Will not result in the destruction, loss, or damage of a natural, scenic, or historic feature of major importance.
-