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**Court of Common Pleas**

**BRIEF**  
**September 29, 2025 20:57**

By: CAROLYN M. DOWNEY 0064371

Confirmation Nbr. 3630066

SHAKER MADISON, LLC.

CV 24 100089

vs.

CITY OF CLEVELAND, ET AL

**Judge:** KEVIN J. KELLEY

**Pages Filed:** 22

**IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

<b>SHAKER MADISON, LLC,</b>	)	<b>CASE NO: CV 24-100089</b>
	)	
<b>Appellant,</b>	)	<b>JUDGE KEVIN J. KELLEY</b>
	)	
<b>v.</b>	)	
	)	
<b>CITY OF CLEVELAND, et al.</b>	)	<b>On Appeal from the decision of the</b>
	)	<b>Board of Zoning Appeals</b>
	)	<b>Calendar No. 24-024</b>
<b>Appellees.</b>	)	
	)	

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**BRIEF OF APPELLEE CITY OF CLEVELAND**

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## **STATEMENT OF THE FACTS**

Shaker Madison, LLC (“Shaker Madison” and/or “Appellant”) owns the property at 10022 Madison Avenue in Cleveland, Ohio (“Property”). Shaker Madison applied for a building permit to construct a “new gas station in a C2 Local Retail Business District and a Pedestrian Retail Overlay District (PRO) Zoning District.”

On January 25, 2024, the Building and Housing Department denied the Appellant’s permit application and issued a Notice of Non-Conformance. The Notice of Non-Conformance informs the applicant of the reason(s) why the permit application was denied. The Notice of Non-Conformance for 10022 Madison Avenue dated January 25, 2024 states:

**Zoning Code**

**Text**

343.23(e)(1)(B)

Pedestrian Retail Overlay District (PRO).  
Gas station is a prohibited use in PRO District

Shaker Madison appealed the Notice of Non-Conformance to the Board of Zoning Appeals (“Board”) by requesting a use variance. The Board initially scheduled a hearing on the appeal for March 4, 2024. Pursuant to Cleveland Codified Ordinance 329.01(i), written notices were mailed to 63 property owners situated near the Property of the upcoming hearing. Public notice of the hearing was also posted in the Cleveland City Record.

The hearing on March 4th was postponed at the request of the Councilman Danny Kelly (“Kelly”) of Ward 11. Kelly wanted to have a community meeting before the Board hearing. The Board rescheduled the hearing to May 6, 2024.

At the public hearing on May 6, 2024, the Board heard testimony from the Sam Mohammed ("Mohammed" and/or "Appellant") who represented Shaker Madison; Ward 11 Councilman Danny Kelly; Nate Lull ("Lull") and Xavier Bay ("Bay") from the City of Cleveland Planning Department; Shannan Leonard ("Leonard"), Zoning Administrator for the City of Cleveland's Planning Department; David Rogers ("Rogers"), Executive Assistant for Ward 11; Chad Dasher ("Dasher"), Westown Community Development Corporation; and Joe Naser ("Naser"), Executive Assistant for Ward 15.

Approximately twenty-five (25) individuals appeared and gave testimony. In addition, several emails and letters received by the Board (according to the resolution, 54 letters were in opposition and 17 letters were in support). Councilwoman Jenny Spencer, whose Ward 15 is adjacent to Ward 11 submitted a letter in opposition to the construction of the gas station.

The Board though legislation consists of five (5) members. However, a quorum can exist if there are only four (4) or three (3) members present. Only four (4) Board members were available at the beginning of the hearing. The Board's secretary made an announcement that each appellant had the right to postpone their hearing until five (5) members were present. Mohammed representing Shaker Madison chose to proceed with the four (4) member panel.

The Board's secretary Elizabeth Kukla ("Kukla") provided a history of the property as it relates to the zoning code. She stated:

This property was originally zoned General Retail and Multi-Family in 1929. In 1966 it was changed to Local Retail Business. In 2013 it was added to the Pedestrian Retail Overlay District. In our

Records Administration Office we found that in 1938 a permit was issued to erect a stores building.

Madam Chair, I'd also like to state that this property is also known as 1991 West Boulevard. There are three variances on our, in the record for those addresses.

Calendar Number 89-87 this Board refused a variance to establish use as used car sales and office in this existing building on sites which was identified as a gas station. That was in 1989. In 1991 this Board refused a variance to change use to a repair garage and that's Calendar 91-154 and that was in 1991 and then in 1998 This Board granted a variance to erect the current building on site. At that time it was known as Rex Discount Drug and that was in 1998 and, again that Calendar number is 98-25.

Madam Chair, I believe that is the pertinent information to report. Thank you. (Transcript, Pages 21-22).

The legal standard the Board was to use was read at the beginning of the hearing.

The Board's attorney, Ms. Cornely stated:

Thank you. Madam Chair and members of board, the Appellant is requesting Use Variance from the requirements of the Zoning Code. To obtain the use variance, the Appellant must prove that denying the request will create an unnecessary hardship particular to the property such that there will be no economically feasible use of the property without the variance, will deprive the Appellant of substantial property rights, and that granting the Variances will not be contrary to the purpose and intent of the Zoning Code (Transcript, Pages 22-23).

Mohammed stated that he was the consultant representing the owners, True North and the developers (Transcript, Page 5). He explained that the gas station would be a small part of the development; the remainder would be retail (Transcript, Page 24) business such as a bank, pizza shop, etc. (Transcript, Pages 30-31).

Mohammed never really stated why the denial of the use variance posed an unnecessary hardship that inheres in and is peculiar to the property because of its physical size, shape or other characteristics. The conditions justifying a variance arise from characteristics of the property itself, not the personal situation of the owner. Unnecessary hardship does not exist unless the property is unsuitable for any of the uses permitted under its zoning classification. *In re Dinardo Const., Inc.* (Ohio App. 11 Dist.), 1999 WL 262161.

Mohammed did address the Board about the financial hardship Shaker Madison would face if the use variance was not granted. However, economic hardship is not the applicable standard when deciding a use variance case.

This hearing was lengthy, continuous and passionate. There was testimony, pro and con, from area residents, area business owners, elected officials, and others.

Before a motion and vote was taken, Board member Holzer announced that she had to abstain from voting on this case. When a letter in opposition from Northwest Neighborhoods was presented she announced that she had been elected to their Board.

She never expressed an opinion on the variance sought by Shaker Madison. She had no influence on the decision made by the Board of Zoning Appeals.

Ultimately, the variance requested by Shaker Madison was denied. On May 10, 2024, Shaker Madison requested a rehearing by the Board. The Board voted against the rehearing. On June 3, 2024, the Board adopted their decision denying the use variance.

## **STATEMENT OF THE CASE**

On July 1, 2024, Shaker Madison filed a Notice of Appeal with the Cuyahoga County Court of Common Pleas pursuant to R.C. 2506.

At the Administrative Appeal's case management conference held on July 11, 2025, following briefing schedule was established:

- Appellant's Brief – September 12, 2025
- Appellee's Brief - September 29, 2025
- Appellant's Reply Brief – October 6, 2025

## **LAW AND ARGUMENT**

### **A. STANDARD OF REVIEW**

It is well established that in reviewing a decision of an administrative board, the courts will presume that the decision is reasonable and valid. *Wade v. City of Cleveland*, (8<sup>th</sup> Dist. 1982), 8 Ohio App.3d 176, 178. In the absence of evidence that the decision was an abuse of discretion, or an act in excess of the power of the board, or unreasonable under all the circumstances, the board's decision will be upheld. *Id.*

Ohio Revised Code §2506.01 provides for the appeal of an order from any board of a political subdivision to the court of common pleas. In reviewing an appeal of an administrative decision, "the court may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. R.C. §2506.04. An administrative agency has broad discretion in its decision-making. A trial

court should not overrule any agency decision when it is supported by a preponderance of reliable and substantial evidence. *Dudukovich v. Lorain Metro. Hous. Auth.* (1979), 58 Ohio St.2d 202, 207.

The common pleas court must weigh the evidence in the record, and whatever additional evidence may be admitted under R.C. §2506.03, to determine whether there exists a preponderance of reliable, probative evidence to support the agency's decision. *Dudukovich v. Lorain Metro. Hous. Auth.* (1979), 58 Ohio St.2d 202, 207. The court, however, may not blatantly substitute its judgment for that of the agency, especially in areas of administrative expertise. *Id.* If there is a preponderance of reliable, probative and substantial evidence, the common pleas court must affirm the agency's decision. *Id.*

**B. SHAKER MADISON FAILED TO MEET THE STANDARDS UNDER CLEVELAND CODIFIED ORDINANCE 329.03 WHICH WOULD ALLOW THE BOARD OF ZONING APPEALS TO GRANT THEIR VARIANCES**

C.C.O. § 329.03(c) requires that "the appellant shall state and substantiate his claim that the three conditions listed under division (b) of this section exist" when seeking a variance. C.C.O. § 329.03(b) limits the Board's variance powers to cases where all of the following conditions are satisfied:

- 1) The practical difficulty or unnecessary hardship inheres in and is peculiar to the premises sought to be built upon or used because of physical size, shape or other characteristics of the premises or adjoining premises which differentiate it from other premises in the same district and create a difficulty or hardship caused by the strict application of the provisions of the Zoning Code not generally shared by other land or buildings in the same district;

- 2) Refusal of the variance appealed for will deprive the owner of substantial property rights; and
- 3) Granting the variance appealed for will not be contrary to the purposes and intent of the provisions of the Zoning Code.

The appellant seeking the variance has the burden of proof before the Board. As set forth by the Ohio Supreme Court, "it is a fundamental principle of Ohio zoning that...the parties challenging the validity of a zoning classification have, at all stages of the litigation, the burden of demonstrating the unconstitutionality or unreasonableness of the zoning code." *Mayfield-Dorsh, Inc. v. City of South Euclid* (1981), 68 Ohio St.2d 156, 157.

In considering a request for a variance, "the ordinance clearly sets forth three conditions that must be met by the [party] seeking the variance prior to the board's exercising the grant of such a variance." Moreover, "[i]t is necessary that the board of zoning appeals read, and apply each subsection of Ordinance 329.03 *in para materia*." *Consolidated Mgmt. v. City of Cleveland* (1983), 6 Ohio St.3d 238, 242. Accordingly, in order for the Board to grant a specific variance, the person seeking the variance must establish the conditions required by C.C.O. § 329.03(1), (2) and (3). Shaker Madison failed to satisfy every condition required by C.C.O. § 329.03(1), (2) and (3); therefore, the Board properly denied their variance request.

**1. Practical difficulty or unnecessary hardship:**

The Ohio Supreme Court, in *Kisil v. City of Sandusky*, (1983), 12 Ohio St.3d 30, has taken the position that "practical difficulty" and "unnecessary hardship" applies to two different types of variances.

“Unnecessary hardship” is the standard that applies to a request for a use variance. *Kisil*. Under C.C.O. § 329.03(1), an applicant for a use variance is must establish that there is an “unnecessary hardship” that inheres in and is peculiar to the property because of its physical size, shape or other characteristics. The conditions justifying a variance arise from characteristics of the property itself, not the personal situation of the owner. Unnecessary hardship does not exist unless the property is unsuitable for any of the uses permitted under its zoning classification. *In re Dinardo Const., Inc.* (Ohio App. 11 Dist.), 1999 WL 262161.

The mere fact that one’s property can be put to a more profitable use does not in itself establish a hardship justifying a variance as long as other alternatives are available. *Consolidated Mgmt. v. City of Cleveland* (1983), 6 Ohio St. 3d 238, 242.

In order to demonstrate unnecessary hardship, Shaker Madison was required to present evidence that the Property, because of its physical characteristics, was unsuitable for any use permitted in a C2 Local Retail Business District and a Pedestrian Retail Overlay District (PRO) Zoning District. Shaker Madison did not present any such evidence to the Board. Instead, the Appellant continuously addressed the significant amount of money for the property. And how the councilman and the community development corporation supported their plans. However, neither the councilman or the community development corporation had the authority to grant the variance.

Shaker Madison argued that there are several other gas stations in the immediate vicinity. According to Lull, one of the gas stations was grandfathered in under the old zoning code. The others are situated in a General Retail District.

Because the Appellant was not seeking an area variance, practical difficulties was not the legal standard to be applied to this case. The Board's attorney read the legal standard for a use variance (unnecessary hardship) into the record. In Shaker Madison's brief, they acknowledge that unnecessary hardship was the correct legal standard to be applied. Yet, Shaker Madison devotes three (3) pages in their brief (Pages 13-15) discussing practical difficulties and the factors in *Duncan v. Middlefield*, 23 Ohio 3d 8 (1986). In its resolution, the Board determined that denial of the variance would not result in an unnecessary hardship particular to the property such that there will be no economically feasible use of the property without the variance. While the *Duncan* factors were discussed during the hearing, they were not controlling.

Shaker Madison, however, failed to show that the property was unusable for any permitted uses due to physical characteristics that are unique to the Property. Therefore, there is no unnecessary hardship that inheres in the property making it unusable for a permitted local retail use. Economic hardship is not a basis for granting a variance under C.C.O. § 329.03. Shaker Madison failed meet his burden of establishing "unnecessary hardship" as required by C.C.O. § 329.03(b)(1).

**2. Deprivation of substantial property rights:**

Shaker Madison failed to provide any evidence that the Board's decision would deprive them of substantial property rights." The Appellant must show why the denial of the variances would deprive them of substantial property rights.

Shaker Madison failed to establish that denial of the variance would deprive him of substantial property rights, a condition required under C.C.O. § 329.03(b)(2). In fact,

they did not present any evidence to establish this condition. Instead, Shaker Madison argues that they would suffer an economic hardship without the variances.

In denying the variances, the Board did not deprive Shaker Madison of substantial property rights. Shaker Madison still has the use of this property for any and all of the permitted uses in a C2 Local Retail Business District and a Pedestrian Retail Overlay District (PRO) Zoning District. Shaker Madison argues that without the requested variances to construct a gas station that they will suffer a substantial loss of their property and will be unable to recoup his investment. Economic loss does not constitute a deprivation of substantial property rights.

Shaker Madison cannot blame the Board for any financial loss they may sustain because the requested variances were denied. Shaker Madison failed to establish that they would be deprived of substantial property rights, as required under C.C.O. § 329.03(b)(2); therefore, the Board properly denied their request for a variance.

**3. Purpose and intent of the zoning code:**

The denial of the requested variance is not outside the intent and spirit of the zoning code.

As Nate Lull from the City Planning Department explained it to the Board, the rezoning by the legislature clearly demonstrates their intention to preserve the pedestrian oriented character of the district and to protect public safety by minimizing conflicts between vehicles and pedestrians.

The legislature in 2013 wanted to assure the continuance of pedestrian safety when it decided to rezone the entire area to a C2 Local Retail Business District and a

Pedestrian Retail Overlay District (PRO) Zoning District. The zoning code is not ambiguous on this issue.

In summary, Shaker Madison failed to establish the three conditions required under C.C.O. § 329.03(b) (1), (2) and (3). As a result, the Board lacked the power to grant a variance and therefore properly denied the variance requests.

**C. THE BOARD'S DECISION WAS NOT ILLEGAL, ARBITRARY OR CAPRICIOUS AND WAS SUPPORTED BY A PREPONDERANCE OF RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE**

Arbitrary and capricious has been defined as "Absence of a rational connection between the facts found and the choice made... a clear error of judgment; an action not based upon consideration of relevant factors. *Dudukovich v. Lorain Metro. Hous. Auth.* (1979), 58 Ohio St.2d 202. There is a strong correlation between the testimony presented at the hearings and the Board's ultimate decision to grant or deny variances.

The Board's Resolution sets forth the facts supporting its decision to deny the variance sought by Shaker Madison. The Board filed conclusions of fact supporting its decision in the Resolution that has been filed with the record, which included the verbatim transcript of the hearing, submitted documents, exhibits, etc.

The Resolution lists some of the reasons for the Board's decision to deny the variances requested by Shaker Madison. Among the reasons listed were:

- Fifty-four (54) opposition letters to the requested variance were submitted;
- Adjacency to a CMSD school and the Cudell Commons Cleveland Recreation

- Center;
- Oversaturation of gas stations in the area;
- Adjacent Ward 15 Councilwoman Jenny Spencer's concerns of the traffic implications that a gas station would bring;
- City Planner Nate Lull stated that there were similar vacant pharmacy buildings that have found occupants without variances;
- Lull also stated that there were five (5) gas stations within two (2) miles of the site;

The Board also considered the seventeen (17) letters of support for the variance. Those in favor of the variance who appeared at the hearing, testified how the vacant building had been an eyesore for years and how new retail would be a positive addition to the neighborhood.

The Board acknowledged support for the variance from Ward 15 Councilman Danny Kelly and Westown Community Development Corporation Director Chad Dasher. Kelly believes would stop drug dealing and other illegal activities. Dasher believes the project will help eliminate blight.

Therefore, based on the record, Board's decision was not arbitrary, capricious or unreasonable and was supported by a preponderance of reliable, probative and substantial evidence.

**D. THE BOARD OF ZONING APPEALS HEARING DID NOT VIOLATE SHAKER MADISON'S RIGHT TO DUE PROCESS**

Due process demands that in any administrative action resulting in the deprivation of property, the governmental agency must afford that individual reasonable notice and an opportunity to be heard. *Great Lakes College, Inc. v. Medical Bd.*(1972),, 29 Ohio St.2d, 198, 200.

Such proceedings, in cases where fairness demands the hearing to include the production of evidence, are known as quasi-judicial proceedings. Quasi-judicial proceedings must include:

- a) Notice
- b) A full and fair hearing, including:
  1. the opportunity to present evidence
  2. the hearing must be held in an expeditious and timely manner as possible under the circumstances
  3. an impartial administrator ruling upon the proceeding

There is no argument as to the notice requirement. The record demonstrates that Shaker Madison was aware of that the Board scheduled a public hearing on May 6, 2024. Notices for that hearing were sent out to nearby property owners as well as being published in the City Record.

The opportunity for a full and fair hearing was afforded to Shaker Madison through the Cleveland Board of Zoning Appeals. Shaker Madison was clearly aware of their right as they did file an appeal with the Board of Zoning Appeals. At the hearing, Shaker Madison was allowed to present evidence through testimony, exhibits and witnesses.

The hearing date on May 6, 2024 for their appeal was set in a timely manner with the expressed approval of Shaker Madison. The proceedings before the Cleveland Board of Zoning Appeals resulted in a ruling before an impartial body.

The members of the Cleveland Board of Zoning Appeals are appointed by the mayor, but do not report to the mayor. They are not employees of the City of Cleveland. The Board satisfies the requirement of an impartial administrator.

Administrative Hearings are Quasi-Judicial Proceedings where the strict adherences to procedural and evidentiary rules are not mandated. The traditional rules of evidence are relaxed in administrative hearings. *Haley v. Ohio State Dental Bd.* (1982), 7 Ohio App. 3d 1. In *North Coast Payphones, Inc. v. City of Cleveland, Board of Zoning Appeals* (Eighth App. Dist. Dec. 27, 2007, WL 444645), the court held:

***Although it may have been preferable to have proceeded like the customary civil trial, we find no requirement that the hearing proceed as such.*** The statute required the BZA to file "a complete transcript of all the original papers, testimony, and evidence offered, heard, and taken into consideration" rendering its final order. R.C. 2506.02. Thus, the board was required to submit all the documents which it considered in reaching its decision. (emphasis added).

Shaker Madison argues that their due process rights were denied because:

- (1) A letter in opposition from the Director of Planning was read into the record without it being provided to Shaker Madison prior to the hearing;
- (2) Board member Holzer abstaining from the case when she became aware that a letter in opposition from another Board (Northwest Neighborhoods) she was elected to had been submitted;

(3) Shaker Madison also objected to the Board's secretary summarizing the voluminous number of letters and emails

A board of zoning appeals hearing is an administrative proceeding, not a criminal or civil trial. Many of the components of a criminal or civil trial are not present at an administrative hearing, i.e. no judge or jury, no separation of witnesses, or pretrial motions, etc. If we accept the appellants' contention that evidence was improperly "proffered," we must also acknowledge the fact that the appellants never raised any objections on the record, therefore; their objections would be waived.

The Board heard testimony from the Appellants and others in favor of the variance being granted as well as from those in opposition. The Board also heard testimony from the Local Development Corporation, the councilman's office and the City of Cleveland's Planning Commission. The collective testimony was factual and probative as to the issues in this case and the Board's decision was not solely based on opinion of one or two people. Like the BZA in *Raisch, Inc. v. Board of Zoning Appeals* Ohio App. 2<sup>nd</sup> Dist., 1999 WL 397347 at \*5, the Board also stated other reasons to support its decision in their resolution.

The *Raish* court stated "**[w]e will not presume that the BZA was so unsophisticated as to have been unable to differentiate between the objective observations and the subjective opinions of the hearing participants where there was other evidence in the record to support its decision.**" *Id.* (emphasis added).

The Board's Resolution sets forth the facts supporting its decision to affirm the decision of the Zoning administrator and for granting the area variance for Ford-Hessler. The Board's conclusions of fact in support of its decision are contained in the Resolution that has been filed with the record, which included the verbatim transcript of the hearing, submitted documents, exhibits, etc.

Shaker Madison's due process rights were not violated. Due process was afforded to Shaker Madison.

### **CONCLUSION**

It is well established that in reviewing a decision of an administrative board, the courts will presume that the decision is reasonable and valid. *Wade v. City of Cleveland*, (8<sup>th</sup> Dist. 1982) 8 Ohio App.3d 176, 178. In the absence of evidence that the decision was an abuse of discretion, or an act in excess of the power of the board, or unreasonable under all the circumstances, the board's decision will be upheld. *Id.*

The Board's power to grant a variance is limited to specific cases where the person seeking the variance has established all three conditions under Cleveland Codified Ordinance 329.03(b). Appellant failed to meet this burden of proof and the Board, as a result, did not possess the power to grant a variance. Accordingly, the Board's decision to deny the Appellant's variance request was supported by a preponderance of reliable, probative and substantial evidence.

For all of the reasons stated above, the City requests that this Court affirm the Board's decision.

Respectfully submitted,

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DIRECTOR OF LAW

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ATTORNEYS FOR CITY OF CLEVELAND

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Brief of Appellee City of Cleveland was filed electronically this 29th day of September 2025. Notice of this filing will be sent by operation of the court's electronic filing system to counsel of record for all parties as indicated on the electronic filing receipt. Parties and their counsel may access this filing through the Court's system.

/s/ Carolyn M. Downey \_\_\_\_\_  
CAROLYN M. DOWNEY  
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