2015 IL App (1st) 140968-U

FOURTH DIVISION
June 30, 2015

No. 1-14-0968



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IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| HAROLD ELGAZAR,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>ZONING BOARD OF APPEALS OF THE CITY OF CHICAGO, ILLINOIS; JONATHAN SWAIN, LORI HEALEY, GERALDINE McCABE-MIELE, LYNETTE SANTIAGO, and SAM TOIA, as board members; and TICE, INC., d/b/a STANDARD BAR AND GRILL,<br><br>Defendants-Appellees. | ) | Appeal from the Circuit Court of Cook County.<br><br>No. 12 CH 33402<br><br>The Honorable Peter Flynn, Judge Presiding. |

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PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court. Justices Howse and Cobbs concurred in the judgment.

**ORDER**

*HELD*: Defendants' briefs and arguments in this cause are considered and will not be disregarded pursuant to plaintiff's request, particularly in light of the various circumstances presented demonstrating that they did not forfeit their right to participate in

this cause; in addition, the ZBA's decision to grant a variation to Standard was not against the manifest weight of the evidence based on the ample evidence presented supporting its findings and conclusion.

¶ 1 Plaintiff-appellant Harold Elgazar (plaintiff) sought administrative review of a decision issued by defendant-appellee Zoning Board of Appeals of the City of Chicago, Illinois, and its members Jonathan Swain, Lori Healey, Geraldine McCabe-Miele, Lynette Santiago and Sam Toia (collectively, the ZBA) granting a zoning variation to defendant-appellee Tice, Inc., d/b/a Standard Bar and Grill (Standard). The trial court affirmed the administrative decision. Following the denial of his motion to reconsider, plaintiff filed a motion to strike the ZBA's and Standard's briefs and arguments from the record due to their failure to properly file a timely appearance. The trial court denied this motion as well.

¶ 2 On appeal, plaintiff challenges both the ZBA's grant of the variation to Standard, contending that it should be reversed because it was based on findings that are against the manifest weight of the evidence, and the trial court's denial of his motion to strike, contending that the ZBA and Standard forfeited their right to participate in this cause because they failed to enter appearances within the time and manner dictated by the Administrative Review Law (735 ILCS 5/3-106 (West 2012)). He asks that we reverse the ZBA's decision while deciding this cause without consideration of the ZBA's and Standard's briefs and arguments, pursuant to *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128 (1976).[1] For the

[1]Plaintiff states in his brief before our Court that he has chosen to present this claim as an issue on appeal rather than in a separate motion to be taken with the case "[i]n the interest of judicial economy."

following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 Standard is a bar and grill restaurant located at 1332 North Milwaukee Avenue in Chicago's Wicker Park neighborhood. Its capacity exceeds 100 patrons and it is in a business B3-3 zoning district. Surrounding it are several business and commercially zoned districts, and running through these and behind Standard are Chicago Transit Authority Blue Line tracks, with Standard on the east side of the tracks and a residentially-zoned RS-3 district at Hermitage Avenue and Ellen Street on the west side of the tracks. Standard is located within 125 feet of the northeast corner of this residential RS-3 district.

¶ 5 Plaintiff owns the building next to Standard, located at 1330 North Milwaukee Avenue. It is in the same B3-3 business district as Standard. Plaintiff rents out the first floor of his building to commercial retail occupants and he rents the upper floor apartments to residential occupants.

¶ 6 Prior to any dealings involved in the instant matter, plaintiff, in 2010, filed a private nuisance lawsuit against Standard with respect to noise at the establishment. All parties here make note that, at the time of the filing of their briefs in this cause, the nuisance suit was still pending before the circuit court of Cook County.[2]

¶ 7 Following Standard's opening, business began to decline. Its owners believed it could

[2]For purposes of the instant appeal, whether the nuisance cause has been resolved at this moment in time and its outcome are not relevant. The only point of interest here, as will be discussed later in our decision, is that there was a preceding nuisance suit involving the parties that was initiated in the trial court in 2010 (case no. 2010 CH 53506).

stay competitive by offering live music or hiring a music manager or disc jockey (DJ), similar to other nearby bars and restaurants. However, the Municipal Code of Chicago (MCC or Code) requires any establishment with an occupancy of more than 100 people to obtain a public place of amusement (PPA) license (MCC, Ill. § 4-156-305 (2012)); it also prohibits any business and commercially zoned establishment located within 125 feet of a residential district from receiving a PPA license unless it first obtains a variation (MCC, Ill. §§ 17-3-0301, 17-13-1101-M (2012)). Due to the fact that Standard's occupancy is greater than 100 people, it required a PPA license to host live music; and, because it is located within 125 feet of a residential zone, it needed to first obtain a variation in order to apply for a PPA license. Accordingly, Standard applied to the ZBA for a variation.

¶ 8 In July 2012, the ZBA held a public hearing on Standard's application. Plaintiff appeared and objected, citing loud music from the establishment as disruptive to his tenants. During the hearing, the ZBA heard testimony from Randy Roginski, Standard's operator; Terrence O'Brien, a professional real estate appraiser; and plaintiff. O'Brien presented a consulting report with respect to the property, and the ZBA accepted it into evidence. Following the conclusion of the hearing, the ZBA issued its decision granting Standard's application for a variation.

¶ 9 In September 2012, plaintiff sought administrative review of the ZBA's decision. He also filed a motion in the trial court to consolidate his administrative review action with his pending nuisance action. The trial court granted his motion to consolidate. On October 16, 2012, the ZBA, via Corporation Counsel of the City of Chicago, filed a motion to reconsider and vacate the court's order of consolidation, seeking to separate the private nuisance and administrative review

causes. The court denied the ZBA's motion and kept the cases consolidated.

¶ 10 The court then held a hearing on plaintiff's request for administrative review. At this hearing, the ZBA was represented by the Corporation Counsel and Standard was represented by its own separate counsel. Following argument, on April 5, 2013, the trial court set aside the ZBA's decision and remanded with instructions to the ZBA to "rehear the variation and to come up with a finding." The court explained in its colloquy that it was "not telling the [ZBA] how to decide this," but that it only wanted the ZBA, upon its decision, "to come up with findings that make it clear that [it] has done the analysis that the Code requires."

¶ 11 On April 30, 2013, the law firm of Burke, Warren, MacKay & Serritella, P.C. (BWMS), which had represented Standard before the ZBA in this dispute but had not yet done so before the trial court under administrative review, filed its general appearance on Standard's behalf in the trial court. Accompanying this, Standard also filed a motion to reconsider the trial court's April 5, 2013 order setting aside the ZBA's decision and remanding the cause. Standard listed the consolidated case number of the pending private nuisance cause of action on its motion. In response, on May 2, 2013, plaintiff filed a motion to require both counsel for Standard and Corporation Counsel for the ZBA to file written appearances in the trial court. In his motion, plaintiff acknowledged that BWMS filed an appearance and paid fees as listed in the case number assigned to the private nuisance suit and that Corporation Counsel represented the ZBA, but insisted the neither BWMS nor Corporation Counsel had filed appearances or paid fees under the case number assigned to the administrative review cause; thus, plaintiff claimed that he was "not clear as to whom or where notices should be sent." Upon examination of these motions, the

trial court denied Standard's motion to reconsider its order setting aside the ZBA's decision and remanding the cause, and likewise denied plaintiff's motion to require defendants' counsel to file written appearances.

¶ 12 In June 2013, the ZBA held a second public hearing, pursuant to the trial court's remand, during which several witnesses testified, including those who had testified at the original hearing. For example, Roginski, who had been operating Standard for over two years, testified that, generally, the restaurant business had changed in that it had become more competitive, with customers demanding live entertainment in addition to just food and sports on television. He noted that Standard is in direct competition with eight other nearby bars and restaurants on Milwaukee Avenue and that all of them have PPA licenses which allow them to host live music. He stated that having a PPA license would help keep Standard competitive and aid it from having to close and create a vacancy in the area. Turning to the fact that the Code allows for restaurants with a capacity of less than 100 people to host live music without first obtaining a variation, Roginski informed the ZBA that Standard had considered cutting its 150-person capacity, but found that it would not be physically or economically feasible. Roginski further noted that he has been working to abate the noise issue with respect to plaintiff, including hiring sound engineers to study the situation, removing speakers from walls that face plaintiff's building and disconnecting others in an effort to reduce the sound impact.

¶ 13 Professional real estate appraiser O'Brien, who was recognized by the ZBA as a "certified *** expert" and who had performed investigations of the property, again submitted his report to the ZBA stating his opinions and findings. He also testified with respect to the character of the

commercial district where Standard is located and the effects the grant of a variation would have. First, he noted, as had Roginski, that eight other bars and restaurants were located within a three-block radius of Standard along Milwaukee Avenue, and that all of them had (or did not require) PPA licenses and had the ability to provide live entertainment. He opined that it would be difficult for Standard to remain competitive in that location were it not able to provide similar live entertainment. He further testified that, with respect to that commercial district, there are numerous vacant storefronts near Standard causing a decline in property values, that this number had almost doubled since the last time this cause was before the ZBA, and that, if Standard fails, its property will become another vacant storefront which will depress property and rental rates in the area. Speaking in terms of the reasonable rate of return, O'Brien commented that this would affect not only Standard and its property, but also real estate and its owners in the surrounding area. When asked if there were any "practical difficulties" or "particular hardship" on Standard due to its "unique circumstances," O'Brien stated that Standard is at a "competitive disadvantage" because it must compete with other similar businesses that have PPA licenses, particularly the eight other establishments mentioned, and this created "a harder, a larger, [and a] more restrictive standard" than its competitors. O'Brien concluded that granting Standard a variation would not alter the character of the neighborhood "at all," but would instead "compliment" it, since the area already included several bars and restaurants with PPA licenses. Likewise, O'Brien concluded that granting the variation would "be a benefit" and not a detriment to the public welfare, nor would it be injurious to other property owners or to improvements in the neighborhood, given both the number of vacancies and the fact that the intended use "compliments other similar uses

in the subject area." He made clear that granting the variation would not impair any supply of light or air to adjacent properties, nor would it increase the congestion in the public streets or endanger the public, particularly since the existing structure would be used to host the live music and would not be altered, the "overwhelming majority of the clientele" is already within the neighborhood, and Standard only intended to host live music two to three nights per week, its hours of operation would not change and all live entertainment would occur within Standard. O'Brien finally noted that Standard was unique in that the CTA elevated train tracks from the Blue Line were immediately to the west of that property, lying directly, and essentially cutting it off, from the residentially-zoned district within 125 of it. Ultimately, O'Brien could find no "adverse impact at all" were the variation granted.

¶ 14 After disputing several of the points made by Roginski and O'Brien, plaintiff affirmed that his building is in the same B3-3 business zoning district as Standard, and not within the residential district at issue. Citing his pending nuisance suit, plaintiff stated that the principle basis for his objection to Standard receiving a variation was that Standard's provision of live music "creates a condition in which [*sic*] prevents the reasonable use and enjoyment" of his property by producing sound at a level that "invades" his property and causes "material annoyance, discomfort, inconvenience, and hurt" to him and his residential tenants "resulting in loss of sleep, and loss of income in the form of reduced rents." He testified that, because Standard and his property abut each other without any setback, there are no other nearby bars or restaurants whose noise level would have the same affect. He admitted that the property which Standard occupies has always been, since even before he owed his building, some sort of

restaurant establishment. And, plaintiff insisted that Standard created its own problems here, having applied for a PPA license in 2007 which was denied yet choosing to remain at that location and designing its business as a place that provides live entertainment knowing it legally could not do so because of zoning restrictions.

¶ 15 In addition to these witnesses, the ZBA called Steve Valenziano, an official from the City of Chicago's Department of Housing and Economic Development. He explained for the ZBA that, because Standard has a capacity of over 100 people, it needs a PPA license to host live music or have a DJ; however, because it is also in a business district located within 125 feet of a residential district, it cannot obtain a PPA license without first obtaining a variation. Valenziano further testified that there is nothing in the Code preventing Standard from playing music at the same level as live music or a DJ, if the music were played through an ordinary stereo system. As Valenziano explained, Standard was not required to obtain a PPA license to play prerecorded music, which it could do at the same loudness level an issue that would be addressed by nuisance law if raised and not via a ZBA zoning variation hearing.

¶ 16 At the close of the hearing, the ZBA took the matter under advisement. On August 26, 2013, the ZBA issued its final resolution with respect to Standard's application for a variation. In its five-page decision, the ZBA reviewed all the evidence presented, including the testimony before it. Then, noting, as had the trial court on remand, that its decision "must be based solely on the approval criteria enumerated in Section 17-13-1107-A, B and C of the Chicago Zoning Ordinance," the ZBA examined that criteria and made specific findings as to each. First, the ZBA found that, pursuant to section 17-13-1107-A, Standard had "proved its case by testimony

and other evidence that a practical difficulty and particular hardship exists regarding the proposed use of the subject property should the requirements of the Zoning Ordinance be strictly complied with." The ZBA pointed out that, were it not for Standard's occupancy rate and its location within 125 feet of a residential district, it could host live entertainment by right and not need a PPA license. In addition, the ZBA noted that the variation "is consistent with the stated purpose and intent of the Zoning Ordinance." Second, in reviewing section 17-13-1107-B, the ZBA found that Standard "proved" that it could not "yield a reasonable rate of return" if the variation were not granted since it requires live music to remain competitive with the eight other bars and restaurants on Milwaukee Avenue that do so, that "the practical difficulty or particular hardship" of having a capacity of over 100 people and being located within 125 feet of a residential district "is a unique circumstance and not generally applicable to other bars and restaurants on this stretch of Milwaukee Avenue," and that the variation "will not alter the essential character of the neighborhood." And, with respect to section 17-13-1107-C, the ZBA found that "a practical difficulty or particular hardship exists," citing the following:

> "(1) the fact that the property is located within 125' of a [residential] district and has an occupancy over 100 [which] results in particular hardship *** as it cannot have a PPA by right despite being located in a [business] district; (2) the conditions *** are not generally applicable to other similarly situated property because other bars and restaurants with occupancies over 100 in a [business or commercial] zoning district are not required to seek a variation for a PPA and can instead have a PPA by right; (3) as [Standard] will continue to occupy the subject

> property, the purpose of the variation is not exclusively based upon a desire to make more money out of the property; (4) [Standard] did not create the zoning situation and cannot feasibly change its occupancy to less than 100; (5) the variation *** will not be detrimental to the public welfare or injurious to other property as it complements other similar uses in the area ***; and (6) the variation will not impair an adequate supply of light or air *** or substantially increase the congestion in the public streets, or increase the danger of fire, or endanger the public safety, or substantially diminish or impair property values within the neighborhood ***."

Therefore, having found that Standard "sufficiently established by testimony and other evidence" the specific criteria needed for a variation pursuant to the Chicago Zoning Ordinance, the ZBA resolved to approve Standard's request and authorized the variation.

¶ 17 Plaintiff once again sought administrative review in the trial court of the ZBA's decision, serving the ZBA via Corporation Counsel and Standard via BWMS with his objections and request for reversal, as well as with his memorandum in support thereof. The ZBA filed the record of its proceedings with the court and it, again via Corporation Counsel, and Standard, again via BWMS, also filed responsive briefs; plaintiff filed and served his reply brief to the parties via their counsel. On January 16, 2014, following review, the trial court affirmed the ZBA's final resolution. Noting that it was not the court's "job to second guess the ZBA" but only to "make sure that the ZBA has done its job," the court stated that "this time around" "the ZBA on remand did its job," and, accordingly, the court affirmed the ZBA's decision to grant the

variation.

¶ 18 On February 13, 2014, plaintiff filed a motion to reconsider the trial court's January 16, 2014 order. The trial court denied his motion. Later, on March 17, 2014, plaintiff filed a motion asking the trial court to strike from the record the briefs and oral arguments presented by the ZBA and Standard during the proceedings, alleging their failure to comply with Illinois Supreme Court Rules and section 3-106 of the Administrative Review Law. On March 28, 2014, the trial court denied this motion as well.

¶ 19 ANALYSIS

¶ 20 As noted, plaintiff appeals from two different orders of the trial court: its January 16, 2014 order affirming the ZBA's final resolution to grant the variation to Standard following remand of the cause,[3] and its March 28, 2014 order denying his motion to strike the ZBA's and Standard's briefs and oral arguments in these proceedings from the record. While the parties in their briefs before this Court deal with the trial court's affirmance first, we choose to address the latter issue first, as we find that it presents a threshold matter affecting our consideration of this appeal.

¶ 21 Turning, then, to plaintiff's second principle argument, he contends that the ZBA and Standard forfeited their right to participate in this cause because they failed to file written appearances within the time and manner permitted under the Administrative Review Law. He asserts not only that the ZBA and Standard failed to appear within the 35-day time limit of

[3]This includes, of course, the trial court's March 4, 2014 denial of plaintiff's motion to reconsider that decision.

section 3-106, but also that they failed to seek leave of court to enter late appearances for good cause shown under Illinois Supreme Court Rule 183. Based on this, plaintiff insists that this Court should decide the merits here without considering the ZBA's or Standard's briefs and arguments, in the same manner we review an appeal on an appellant's brief only pursuant to *Talandis Construction Corp.*, 63 Ill. 2d 128 (1976). We disagree.

¶ 22 Section 3-106 of the Administrative Review Law states:

> "Appearance of defendants. In any action to review any final decision of any administrative agency, the agency shall appear by filing an answer consisting of a record of the proceedings had before it, or a written motion in the cause or a written appearance. All other defendants desiring to appear shall appear by filing a written appearance. Every appearance shall be filed within the time fixed by rule of the Supreme Court, and shall state with particularity an address where service of notices or papers may be made upon the defendant so appearing, or his or her attorney." 735 ILCS 5/3-106 (West 2012).

In conjunction with this, Illinois Supreme Court Rule 291(c) (eff. May 30, 2008), which governs proceedings under the Administrative Review Law, dictates that a defendant in an administrative review action "shall appear not later than 35 days after the date the summons bears."

¶ 23 From these provisions, several principles are clear. Defendants to these suits who wish to appear but who are not administrative agencies are to file a written appearance within 35 days. See 735 ILCS 5/3-106 (West 2012); Illinois Supreme Court Rule 291(c) (eff. May 30, 2008). Meanwhile, an administrative agency that is a defendant to such suits may also appear by filing a

written appearance within 35 days; however, it may alternatively choose, as its method of appearance, to file a written motion in the cause or to simply file the record. See 735 ILCS 5/3-106 (West 2012). If the agency chooses to file the record to effectuate its appearance, it is not required to do so until such time as it is required to file an answer. See *Davis v. Chicago Police Board*, 268 Ill. App. 3d 851 (1994). Ultimately, although all named defendants wishing to appear may do so by filing written appearances within the 35-day time limit fixed by Supreme Court rule, the only answer that is required is the administrative agency's record. See *Biscan v. Village of Melrose Park Board of Fire & Police Com'rs*, 277 Ill. App. 3d 844, 847 (1996); accord *Lachenmyer v. Didrickson*, 263 Ill. App. 3d 382, 389 (1994) ("[w]hile the Review Law requires all parties desiring to appear must file an entry of appearance in the time fixed by supreme court rule, in an administrative review proceeding, the only answer required is the record of the administrative agency" [internal citations omitted]). And, the Administrative Review Law "plainly gives the circuit court the power to extend the time for filing an appearance or answer." *H.D., Ltd. v. Department of Revenue*, 297 Ill. App. 3d 26, 32 (1998) (trial court had authority to extend time for department to file answer in taxpayer's administrative review action); accord *Lachenmyer*, 263 Ill. App. 3d at 389 (trial court did not abuse its discretion in declining to default employer that did not timely file entry of appearance in action for review of administrative decision, particularly where claimant could not show that he was harmed by delay of employer in filing answer); see also *Straub v. Zollar*, 278 Ill. App. 3d 556, 563 (1996), *abrogated on other grounds by Martin v. Department of Professional Regulation*, 284 Ill. App. 3d 591, 596 (1996) (trial court justified in permitting agency to file late appearance).

¶ 24 Based on all this, there are several reasons why we disagree with plaintiff's assertion that the ZBA's and Standard's briefs and arguments on review should not be considered. First, his assertion is waived. As the record shows, plaintiff waited until March 17, 2014 to request this relief. This came nearly two months after the trial court had affirmed the ZBA's final resolution after remand. Plaintiff's precise argument was not that the ZBA should not have considered these contrary arguments but, rather, that the trial court erred in allowing the ZBA and Standard to participate in the administrative action. This argument of trial court error should have been presented to the trial court itself before it reached its decision on January 16, 2014, or, at the very least, in his motion to reconsider that decision, which he filed on February 13, 2014. See *Golf v. Henderson*, 376 Ill. App. 3d 271, 280 (2007); *Horrell v. City of Chicago*, 145 Ill. App. 3d 428, 431 (1986) (issue concerning alleged trial court error not raised before trial court is waived). However, plaintiff made no mention of this issue then, but instead waited until March 17, 2014 after, as Standard points out, both it and the ZBA had appeared in the administrative review action, Standard had filed a motion to reconsider the remand order, the ZBA held a second public meeting, plaintiff filed his objections to the ZBA's final resolution, the ZBA and Standard filed briefs in response to plaintiff's objections, plaintiff filed his reply, the trial court affirmed the ZBA's final resolution, plaintiff filed his motion to reconsider and the trial court considered and denied his motion. To raise such an argument at this late point in the proceedings is untenable.

¶ 25 In addition, as we have explained, the requirement that a defendant in an administrative review action appear within 35 days of the date of summons, as referred to by section 3-106 and

Rule 291, is discretionary and lies within the sound consideration of the trial court. See *H.D., Ltd.*, 297 Ill. App. 3d at 32; *Lachenmyer*, 263 Ill. App. 3d at 389; see also *Straub*, 278 Ill. App. 3d at 563. Therefore, it is not, as plaintiff implies, jurisdictional. Here, plaintiff's summons bore the date of September 4, 2012; 35 days following this would have been October 9, 2012. The ZBA filed its appearance under section 3-106 when it filed its first written motion in this cause on October 16, 2012, seeking to vacate the consolidation order which combined this administrative review case with plaintiff's long-pending nuisance case. Technically, then, the ZBA's appearance was seven days "late." However, plaintiff did not raise this point at that time and the trial court did not strike the appearance. Instead, the court heard the ZBA's motion and actually ruled on it, essentially accepting its appearance which, as discussed above, was well within its discretion to do. And, soon thereafter, the ZBA filed the record in this cause, again without any protest by plaintiff or denial by the trial court.

¶ 26 Moreover, we find that the trial court properly accepted both the ZBA's and Standard's appearances. Plaintiff makes much of the fact that Standard, specifically, listed the consolidated case number of the nuisance cause in filing its appearance in the administrative review action, insisting that because of this, he did not know who was appearing in the administrative action or where to send notices regarding it. However, plaintiff's administrative review action was consolidated, via his very own motion, with his long-pending nuisance action only 16 days after he filed his complaint for administrative review. Both of these actions were always before the same trial judge. The ZBA was always represented by Corporation Counsel, and Standard was also represented by counsel first, by one firm, but then by BWMS as of April 2013. At that

time, Standard filed a motion to reconsider the trial court's order setting aside the ZBA's initial decision and calling for remand, listing the consolidated case number of the nuisance cause. Contrary to plaintiff's insistence, this is immaterial. The nuisance cause had a lower case number; it is the lowest docket number to which consolidated causes are referred. Simply because Standard's written appearance was under that case number as opposed to the administrative review case number does not prevent it from participating in that action. Again, the causes were consolidated (at the request of plaintiff, no less), and plaintiff acknowledged in his May 2, 2013 motion to require the ZBA and Standard to file written appearances that Corporation Counsel represented the ZBA and BWMS represented Standard in the administrative review action. Plaintiff presents us with no case law to the contrary barring a party from participating in a consolidated action under these circumstances. Therefore, we find his argument insisting that we disregard the ZBA's and Standard's briefs and arguments here to be unavailing.

¶ 27 Even were we incorrect in our views on this point, as we explain below, in an administrative review action, such as the instant cause, we review the agency's decision, namely, the ZBA's grant of the variation to Standard, which is properly part of the record before us, and not any ruling or decision made by the trial court. Accordingly, it is the propriety of the ZBA's decision, above and beyond the arguments of any of the parties here with respect to the trial court, that takes prominence and is our primary focus. See *Kimball Dawson, LLC v. City of Chicago Department of Zoning*, 369 Ill. App. 3d 780, 787 (2006) (if testimony at administrative hearing is preserved in the record, reviewing court has sufficient grounds to examine an agency's

determination, and reviewing court may rely on any basis in record to affirm that decision).

¶ 28 Turning, then, to this substantive issue, we begin by establishing our standard of review. The parties here agree, and they are correct, that this cause presents a question of fact, namely, whether the ZBA properly granted the variation to Standard based on the requirements of the law involved. See *Kimball Dawson*, 369 Ill. App. 3d at 787-88; see also *Heft v. Zoning Board of Appeals of Peoria County*, 31 Ill. 2d 266, 269 (1064) (whether zoning variation was properly granted turns on facts at issue), and *Mile Square Service Corp. v. City of Chicago Zoning Board of Appeals*, 42 Ill. App. 3d 849, 857 (1976). Pursuant to the Administrative Review Law, in determining whether the agency's findings of fact are against the manifest weight of the evidence, we, as the reviewing court, are to examine only the board's decision, not that of the trial court. See *Daniels v. Police Board*, 338 Ill. App. 3d 851, 858 (2003); see also *Cesario v. Board of Fire, Police and Safety Commissioners of the Town of Cicero*, 368 Ill. App. 3d 70, 74 (2006). Accordingly, and in addition, the board's findings are considered to be *prima facie* true and correct, and we may not reweigh the evidence or make any independent determinations of fact. See *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 88 (1992); *O'Boyle v. Personnel Board*, 119 Ill. App. 3d 648, 653 (1983) (the agency is "charged with the primary responsibility of adjudication in [its] specialized area"); see also *Caliendo v. Martin*, 250 Ill. App. 3d 409, 416 (1993) (these activities are not the function of the court, but rather, are only for the agency). Thus, we may not substitute our judgment for that of the ZBA here. See *Abrahamson*, 153 Ill. 2d at 88. Nor is reversal of the ZBA's decision justified simply because the opposite conclusion is reasonable or because we might have ruled differently. See *Abrahamson*,

153 Ill. 2d at 88; *Caliendo*, 250 Ill. App. 3d at 416 (this is not sufficient to set aside the agency's decision). Instead, in order for us to find that the ZBA's decision granting the variation to Standard is truly against the manifest weight of the evidence, we must be able to conclude that " 'all reasonable and unbiased persons, acting within the limits prescribed by the law and drawing all inferences in support of the finding, would agree that the finding is erroneous' and that the opposite conclusion is clearly evident." *O'Boyle*, 119 Ill. App. 3d at 653, quoting *Daniels v. Police Board*, 37 Ill. App. 3d 1018, 1023 (1976) and *Jenkins v. Universities Civil Service Merit Board of the State Universities Civil Service System*, 106 Ill. App. 3d 215, 219 (1982) (internal citation omitted); see also *Abrahamson*, 153 Ill. 2d at 88 (the agency's decision is against manifest weight "only if the opposite conclusion is clearly evident"); *Yeksigian v. City of Chicago*, 231 Ill. App. 3d 307, 310 (1992) (the agency's decision is not against manifest weight "unless the opposite conclusion is clearly evident *** and, no rational trier of fact, viewing the evidence in the light most favorable to the [agency], could have agreed with the *** determination"). This is an exacting standard and, if there is anything in the record which fairly supports the ZBA's conclusion, it is not against the manifest weight of the evidence and must be sustained. See *Kimball Dawson*, 369 Ill. App. 3d at 786; *Finnerty v. Personnel Board*, 303 Ill. App. 3d 1, 12 (1999) (if there is evidence in the record to support the agency's decision, it must be affirmed); *Caliendo*, 250 Ill. App. 3d at 416. The burden to prove otherwise squarely and consistently remains on the party challenging the administrative decision, namely, plaintiff here. See *Roman v. Cook County Sheriff's Merit Board*, 2014 IL App (1st) 123308, ¶ 66, citing *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 532-33 (2006).

¶ 29 Based on our thorough review of the record before us, we find that there was ample support for the ZBA's decision to grant the variation to Standard and, therefore, its decision was not against the manifest weight of the evidence.

¶ 30 Section 17-13-1107-A of the MCC states that, in order to grant a variation, the ZBA must make specific findings, based on evidence presented before it, that "1. strict compliance with the regulations and standards of this Zoning Ordinance would create practical difficulties or particular hardships for the subject property; and 2. the requested *variation* is consistent with the stated purpose and intent of this Zoning Ordinance." MCC, Ill. § 17-13-1107-A (2012). In determining whether strict compliance with the existing regulations and standards would create practical difficulties or particular hardships for the property as required under section 17-13-1107-A1, the ZBA must examine the three criteria listed in section 17-13-1107-B. See MCC, Ill. § 17-13-1107-B (2012). In other words, to find that practical difficulties and particular hardships exist, the ZBA must first find evidence that "1. the property in question cannot yield a reasonable return if permitted to be used only in accordance with the standards of this Zoning Ordinance; 2. the practical difficulties or particular hardships are due to unique circumstances and are not generally applicable to other similarly situated property; and 3. the *variation*, if granted, will not alter the essential character of the neighborhood." MCC, Ill. § 17-13-1107-B (2012). In addition to these, the ZBA, in making its determination of whether practical difficulties or particular hardships exist, "must take into consideration the extent to which evidence has been submitted substantiating" six other enumerated factors, including, briefly, whether the conditions of the property would result in hardship upon the property owner if the strict regulations were upheld,

whether the conditions upon which the petition for variation is based would be applicable to other property in the same zoning classification, whether the purpose of the variation is based exclusively upon a desire to make money, whether the alleged difficulty or hardship has been created by someone with interest in the property, whether the granting of the variation will be detrimental to the public welfare or injurious to other property, and whether the proposed variation will impair adequate supply of light and air to adjacent property or substantially increase congestion, fire and safety concerns or impair property values in the neighborhood. See MCC, Ill. § 17-13-1107-C (2012).

¶ 31 In the instant cause, plaintiff asserts two points of error on the part of the ZBA in granting the variation to Standard. First, he claims that the ZBA's finding that Standard's hardship is due to unique circumstances and not generally applicable to other similarly situated property is against the manifest weight of the evidence under section 17-13-1107-B2. Second, he claims that the ZBA's finding that Standard's requested use is consistent with the stated purpose and intent of the Zoning Ordinance is against the manifest weight of the evidence under section 17-13-1107-A2. We disagree with both of these assertions.

¶ 32 With respect to the ZBA's findings under section 17-13-1107-B2, the evidence confirming that Standard's hardship is due to unique circumstances that are not generally applicable to other similarly situated property was voluminous. For example, Chicago city official Valenziano, called specifically by the ZBA itself, described that Standard's hardship was unquestionably unique. He explained that, because Standard has a capacity of over 100 people, it needs a PPA license to host live entertainment. However, because it is also in a business district

located within 125 feet of a residential district, it cannot obtain a PPA license without first obtaining an variation. More specifically, Standard's operator Roginski explained to the ZBA the change in customer demands since Standard opened, moving from simply food and sports on television to desiring live entertainment. This was evidence by approximately eight other nearby bars and restaurants on the same strip of Milwaukee Avenue that are in direct competition with Standard but that all have PPA licenses or have the ability of right to provide live entertainment. Roginski testified that it was essential for Standard to have a PPA license as well if it were to remain competitive and open for business. Standard had considered cutting its capacity so as to be able to obtain a PPA as of right, but Roginski clarified that this simply was not physically or economically possible based on the space Standard occupied and its finances. And, real estate appraisal expert O'Brien described in detail that Standard's unique circumstances are not generally applicable to other similarly situated property. O'Brien confirmed Roginski's testimony that there are at least eight other bars and restaurants within a three-block radius of Standard, all of which have or did not require PPA licenses to provide live music. O'Brien opined that this made it very difficult for Standard to remain competitive in that location without a variation, stating that Standard undeniably has a "competitive disadvantage" as a result because it faces "a harder, a larger, [and a] more restrictive standard" than its competitors. In addition to acknowledging its poor rate of return without a variation, O'Brien also pointed out that Standard was essentially severed from the residentially-zoned district at issue by the CTA elevated tracks from the Blue Line immediately to its west, but was nonetheless affected by the 125-foot location restriction imposing the requirement of a variation. Without a variation, O'Brien opined, as did

Roginski, that Standard would go out of business, just as several bar and restaurant establishments before it in the same location.

¶ 33 As Standard notes, our courts have found that the concept of "unique circumstances" can embody an "unusual topographical feature," "difficulty of a dimensional nature," or "hardship of use adaptability." *River Forest State Bank & Trust Co. v. Zoning Board of Appeals of Maywood*, 34 Ill. App. 2d 412, 419 (1961). Clearly, Valenziano, Roginski and O'Brien all testified before the ZBA and concurred that Standard faced practical difficulties and hardships that were due to its "unique circumstances" circumstances that, as we have described and as are evident in the record before us, embody the concept behind that phrase and that are not generally applicable to other similarly situated properties. Thus, the ZBA most properly concluded that, under section 17-13-1107-B2, Standard sufficiently proved that the practical difficulty or particular hardship of its being located within 125 feet of a residential district and having an occupancy over 100 "is a unique circumstance and not generally applicable to other bars and restaurants on this stretch of Milwaukee Avenue."

¶ 34 Plaintiff makes two arguments for his insistence that the manifest weight of the evidence lies in contradiction of the ZBA's holding with respect to section 17-13-1107-B2. First, he claims that there was evidence presented, namely, several zoning maps to which he cites, demonstrating other commercial parcels along Milwaukee Avenue that are within 125 feet of a residential district but cannot be utilized in such a way that requires a PPA license. However, as Standard and the ZBA note, and as the record makes clear, plaintiff presented the majority of these maps for the first time in this cause as an exhibit to his reply brief before the trial

court after the ZBA issued its decision. And, with respect to the remaining maps properly presented, plaintiff still never argued to the ZBA that they showed other commercial properties within 125 feet of a residential district. Thus, having never made this claim before the ZBA itself, it cannot be considered now. See *Wortham v. City of Chicago Dept. of Administrative Hearings*, 2015 IL App (1st) 131735, ¶ 15, citing *Cinkus v. Village of Stickney*, 228 Ill. 2d 200, 212-13 (2008) (if argument is not raised in administrative hearing, it is procedurally defaulted and cannot be raised for the first time in the courts upon review).

¶ 35 Moreover, even if plaintiff had properly presented this argument and accompanying evidence, it would have had no affect on the propriety of the ZBA's decision here. That some such commercial parcels exist along Milwaukee Avenue that are also within 125 feet of a residential district but are not utilized so as to require a PPA license is not only irrelevant to the situation at hand but also, and most certainly, does not change it. Again, the manifest weight of the evidence demonstrated that, relevant to Standard (the entity seeking the variation), the majority of properties in this area are not within 125 feet of a residential district, the majority of other bars and restaurants there (*i.e.*, Standard's direct competitors) could obtain PPA licenses as of right or did not need to based on their occupancy rates, the only reason Standard could not obtain a PPA license was because it lies within 125 feet of a residential district despite the Blue Line tracks separating it from that property, and Standard has no economically or structurally feasible way to reduce its occupancy rate so as to be able to provide live entertainment without a PPA license and, thus, without a variation to obtain one. And, we are also unpersuaded by plaintiff's insistence that granting a variation in these circumstances will result in a slippery slope

whereby, as plaintiff fears, other neighboring property owners will make similar demands that will eventually change the character of the district. The Zoning Ordinance has several provisions that work to prevent changes to the essential characteristics of neighborhoods, including, and specific to applications for variations, sections 17-13-1107-B3, which requires the ZBA to cite evidence finding that a variation will not effect such changes before it may grant one. See MCC, Ill. § 17-13-1107-B3 (2012). Interestingly, in the instant cause, the ZBA actually made such an explicit finding in its final resolution granting Standard the variation, based particularly upon O'Brien's testimony that such variation would "compliment" the area at issue which already includes several bars and restaurants with PPA licenses.[4]

¶ 36 Plaintiff's other argument for his insistence that the manifest weight of the evidence did not support the ZBA's finding with respect to Standard's "unique circumstances" under section 17-13-1107-B2 is his claim that the ZBA improperly compared the property at issue to "other bars and restaurants" rather than to "other similarly situated property" as required by that section of the Zoning Ordinance. He hones in on the ZBA's finding in its decision that "the practical difficulty or particular hardship" of Standard having a capacity of over 100 people and being located within 125 feet of a residential district "is a unique circumstance and not generally applicable *to other bars and restaurants on this stretch of Milwaukee Avenue*," while noting that the language of section 17-13-1107-B2 states that the ZBA "must find evidence" that "the practical difficulties or particular hardships are due to unique circumstances and are not generally

[4]Another such provision is section 17-13-1107-C, which the ZBA also explicitly concluded had been satisfied by the evidence Standard presented in the record here. See MCC, Ill. § 17-13-1107-C (2012).

applicable to *other similarly situated property*." See MCC, Ill. § 17-13-1107-B2 (2012) (emphasis added). He states that this improper comparison led to an "arbitrary, fanciful, and unreasonable" analysis that resulted in an inappropriate decision by the ZBA.

¶ 37 Plaintiff's argument here is comprised of nothing more than semantics and one that hardly proves the ZBA's decision to grant the variation was against the manifest weight of the evidence. As we have noted herein, pursuant to the principles of administrative review law, determinations with respect to credibility and evidence involved in proceedings for variations, along with the interpretation of the Zoning Ordinance's provisions, are within the exclusive purview of the ZBA which is tasked with its application. See *Sloper v. City of Chicago, Dept. of Administrative Hearings*, 2014 IL App (1st) 140712, ¶ 15 (courts are to defer to agency's reasonable interpretations of its own statute it is charged to administer and enforce); *Sycamore Community Unit School Dist. No. 427 v. Illinois Property Tax Appeal Board*, 2014 IL App (2d) 130055, ¶ 27 (agency's interpretation of its statute is "an informed source, helpful to ascertaining the legislative intent, because of the agency's expertise and experience in enforcing the statute"). After all, it is this administrative body that "has experience in reviewing countless requests [for variations] for properties throughout the City." *Kimball Dawson, LLC*, 369 Ill. App. 3d at 790.

¶ 38 The very essence of this dispute from its inception was whether Standard's practical difficulties or particular hardships were due to its unique circumstances as a bar and restaurant without the ability to obtain a PPA license (*i.e.*, requiring a variation first) on this stretch of Milwaukee Avenue that included some eight other bars and restaurants all of which had (or did not need) a PPA license and were providing live entertainment as customers demanded. In fact,

much of the testimony from the witnesses and questions from the ZBA centered around Standard as compared to these other particular bars and restaurants, whether Standard could continue to compete with them if the variation were not granted, and the impact Standard's closing would have on the local community if it did not obtain the variation. Even plaintiff admitted during his testimony that, as long as he could remember, the property Standard occupied had always operated as a bar and restaurant. Thus, following all the arguments and evidence that compared Standard to these other similar bars and restaurants, that the ZBA chose to be specific in its findings as it did rather than track the more general statutory language was proper and only, quite frankly, expected. What was critical here with respect to the property at issue was not only its location but also, and perhaps even more so, the type of business conducted there.

¶ 39 What is more, even though the ZBA chose to use this more specific language in its decision, it is quite clear that it followed the proper dictates of the Zoning Ordinance in making its considerations. That is, while it is true that the ZBA used the language in its decision, as cited by plaintiff, that Standard's unique circumstance were "not generally applicable *to other bars and restaurants on this stretch of Milwaukee Avenue*," instead of tracking the statutory phrase "not generally applicable to *other similarly situated property*" (MCC, Ill. § 17-13-1107-B2 (2012) (emphasis added)), he is, essentially, manipulating one phrase of an otherwise lengthy and comprehensive decision in an attempt to support his unsupportable argument. Critically, it is more than clear from the ZBA's written decision that it was well aware of what the statutory language said and that it abided by it. And, it actually did, indeed, track this very language of section 17-13-1107-B2 in a subsequent paragraph it wrote describing its findings with respect to

related section 17-13-1107-C. The ZBA stated there that it found "the conditions *** *are not generally applicable to other similarly situated property* because other bars and restaurants with occupancies over 100 in a [business or commercial] zoning district are not required to seek a variation for a PPA and can instead have a PPA by right." (Emphasis added). Thus, plaintiff's claim of an improper comparison is meritless.

¶ 40 Accordingly, despite plaintiff's assertions to the contrary, we conclude that the ZBA's finding pursuant to section 17-13-1107-B2 of the Zoning Ordinance that Standard's hardship is due to unique circumstances and not generally applicable to other similarly situated property was in no way against the manifest weight of the evidence.

¶ 41 Plaintiff's final contention of error on the part of the ZBA in granting the variation to Standard involves section 17-13-1107-A2 of the Zoning Ordinance. He claims that the ZBA's finding that Standard's requested use is consistent with the stated purpose and intent of the Zoning Ordinance, as per that section, is against the manifest weight. Again, however, we disagree.

¶ 42 As noted earlier, section 17-13-1107-A2 prohibits the ZBA from granting a variation unless it finds that, based on the evidence presented, "the requested *variation* is consistent with the stated purpose and intent of this Zoning Ordinance." MCC, Ill. § 17-13-1107-A2 (2012). That section then refers to section 17-1-0500, which presents the 15 enumerated "purposes" of the Zoning Ordinance:

> "17-1-0500 Purpose and intent.
>
> This Zoning Ordinance is adopted for the purpose of:

17-1-0501 promoting the public health, safety and general welfare;

17-1-0502 preserving the overall quality of life for residents and visitors;

17-1-0503 protecting the character of established residential neighborhoods;

17-1-0504 maintaining economically vibrant as well as attractive business and commercial areas;

17-1-0505 retaining and expanding the city's industrial base;

17-1-0506 implementing the policies and goals contained with official adopted lands, including the *Central Area Plan*;

17-1-0507 promoting pedestrian, bicycle and transit use;

17-1-0508 maintaining orderly and compatible land use and development patterns;

17-1-0509 ensuring adequate light, air, privacy, and access to property;

17-1-0510 encouraging environmentally responsible development practices;

17-1-0511 promoting rehabilitation and reuse of older *buildings*;

17-1-0512 maintaining a range of housing choices and options;

17-1-0513 establishing clear and efficient development review and approval procedures;

17-1-0514 accommodating growth and development that complies with the preceding stated purposes; and

17-1-0515 Enabling the city to establish an integrated network of city digital signs." MCC, Ill. §§ 17-1-0500-0515 (2012).

Plaintiff focuses the majority of his argument here on the purposes of promoting the public health, safety and general welfare (section 17-1-0501) and of preserving the overall quality of life for residents and visitors (section 17-1-0502). Yet, based on our review of the record, the ZBA had voluminous evidence before it demonstrating that the variation Standard sought to obtain was, indeed, consistent with the purpose and intent of the Zoning Ordinance as a whole.

¶ 43 In addition to the maps and other evidence the ZBA considered, the testimony of the witnesses spoke directly, and amply, to the fact that granting the variation would be consistent with the purpose factors to be considered. All of the witnesses, plaintiff included, agreed that this area, this strip of Milwaukee Avenue, is, undeniably, a commercial district housing several bars and restaurants. Roginski testified that Standard needed the variation to obtain a PPA license in order to stay competitive and remain in business and, consequently, to prevent the creation of another vacancy in the area. O'Brien, corroborating this, testified extensively with respect to not only the existing character of the area but also to the effect a denial of the variation would have. He stated that without a variation, if would be very difficult for Standard to remain competitive and in business in that area. He noted that there were already several vacant storefronts near Standard that were causing a decline in property values, that this number had doubled in recent years and that, if Standard failed, it would further depress property and rental values and affect real estate and its owners in the surrounding area. Conversely, O'Brien made clear that granting the variation would actually "be a benefit" to the public welfare and not

injurious to the neighborhood, since Standard's intended use would compliment the properties around it. O'Brien also confirmed, pursuant to his written report, that granting the variation would not create any concerns such as impairing light or air to adjacent properties, increasing congestion, or endangering the public. Rather, as he noted, Standard would be hosting its live entertainment within its own building, thereby utilizing its own space. Accordingly to O'Brien, whom the ZBA qualified without objection as a property appraisal expert, there was no "adverse impact at all" to granting the variation. This evidence provided more than a satisfactory basis for the ZBA's decision finding that granting the variation was consistent with the relevant enumerated purposes stated in section 17-1-0500 of the Zoning Ordinance.

¶ 44 The crux of plaintiff's argument in this respect is that the ZBA did not consider how he would be injured by a grant of the variation and that his injury, which he explained was the sound transmission from the proposed live entertainment from Standard to his property thereby affecting his tenants and, consequently, his rents, was inconsistent with the purpose and intent of the Zoning Ordinance. His argument, however, is flawed for many reasons.

¶ 45 First, as Standard and the ZBA point out, the few cases plaintiff cites to in support of his argument involve special use permits, not zoning variations, which involve wholly separate and distinguishable approval criteria, including the enumerated purposes of section 17-1-0500 at issue in this argument. Contrast MCC, Ill. §§ 17-1-0500-0515, 17-13-1107-A, B, C (2012) (discussing the requirements for variations), with MCC, Ill. § 17-13-0905-A (2012) (discussing the requirements for special use permits); see also *City of Chicago Heights v. Living Word Outreach Full Gospel Church and Ministries, Inc.*, 196 Ill. 2d 1, 17 (2001) (cited by plaintiff but

stating that "[s]pecial uses must be clearly distinguished from use variances"). Next, plaintiff failed to provide the ZBA with any concrete evidence of his alleged injury. That is, he did not present any evidence to show the loss of rents or value he alleged or tenants opposing the variation. In fact, the evidence shows that plaintiff was the only objector to Standard's variation application. What is more, the alleged injury really has no substantial relationship to this entire variation process. Valenziano testified, and Roginski and plaintiff agreed, that Standard can, without a variation or PPA license, play prerecorded music via a stereo or computer medium just as loudly as a live band or DJ can. As Valenziano explained, issues in this respect are resolved via nuisance law and have nothing to do with Standard seeking a variation. Indeed, the record clearly evidences that plaintiff has a pending nuisance suit against Standard. But, this is wholly unrelated to the propriety of the ZBA's decision to grant the variation; Standard has not even obtained a PPA license yet and it is not known for certain that it will. And, those sections of the Zoning Ordinance that govern the issuance of a variation and prohibit establishments seeking a PPA license from being located within 125 feet of a residential district unless they first obtain a variation are aimed at protecting residential districts. See MCC, Ill. §§ 17-3-0301, 17-13-1101-M (2012). But, as the ZBA and Standard aptly point out, plaintiff's property is not in a residential district; rather, it is located, by his own admission and as is evident in the record, in the same B3-3 zoning district as Standard. Thus, plaintiff is not even part of the area the ZBA considers in need of protection with respect to granting variations. This, in combination with the fact that, although the B3-3 district is within 125 feet of the residential district, the Blue Line tracks are located in such a manner that they essentially cut off these zones from each other at

this section of Milwaukee Avenue as O'Brien testified, further supported the ZBA's decision here.

¶ 46 From all this, and upon our review and consideration of the statutorily enumerated sections at issue, we conclude that the ZBA's finding pursuant to section 17-13-1107-A2 specifically holding that the variation "is consistent with the stated purpose and intent of the Zoning Ordinance" was not against the manifest weight of the evidence.

¶ 47 In sum, there was more than sufficient evidence present in the record and before the ZBA to support its findings that Standard's practical difficulties or particular hardships were due to unique circumstances that are not generally applicable to other similarly situated property under section 17-13-1107-B2, and that the requested variation is consistent with the stated purpose and intent of the Zoning Ordinance under section 17-13-1107-A2. Accordingly, we hold that the ZBA's decision to grant the variation to Standard was not against the manifest weight of the evidence.

¶ 48 CONCLUSION

¶ 49 For all the foregoing reasons, we affirm the ZBA's decision, as well as that of the trial court, granting the variation to Standard pursuant to the dictates of the Zoning Ordinance.

¶ 50 Affirmed.