

[Cite as *Franklin v. Berea*, 2010-Ohio-4350.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93894

DOMONIC FRANKLIN, ET AL.

PLAINTIFFS-APPELLANTS

vs.

CITY OF BEREA, ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-682536

BEFORE: Boyle, P.J., Celebrezze, J., and Cooney, J.

RELEASED AND JOURNALIZED: September 16, 2010

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MARY J. BOYLE, P.J.:

{¶ 1} Plaintiffs-appellants, 19 individuals who reside near the property at issue (collectively “the neighbors”), appeal from a judgment of the Cuyahoga County Court of Common Pleas that upheld a decision of the Berea Planning Commission (“the Commission”) granting nine area variances to The United Methodist Church of Berea (“the Church”). We affirm.

Procedural History and Facts

{¶ 2} The Church’s building complex is located at 170 Seminary Street in Berea. The area is zoned as a R-SF-A, a residential single-family district, and the Church is deemed a “conditionally permitted use” in the district.

{¶ 3} In January 2008, the Church purchased the property immediately north of its premises, located at 188 Seminary Street, which was ultimately consolidated with the Church’s four other lots. In September 2008, the Church applied for several variances to construct a new 13,266 square foot addition to its existing facility. The Church also sought an extension of its pre-existing conditional use and building permits.

{¶ 4} On October 2, 2008, the Planning Commission held its first hearing on the requested variances. The Church briefly explained the history of the site, noting that the first Methodist Episcopal Church was dedicated on this site in 1900. As the Church evolved and changed over the years, The United Methodist Church of Berea was formed in 1968, and the Church has been an established part of Berea since then, serving the needs of its congregation as

well as the community. But due to the changing needs of its congregation, the Church seeks to build an addition to its existing building to add a fellowship hall, offices, elevator, kitchen, and new entryway. The Church further represented that this project is essential to the vitality of its membership, including the needs of its younger members and senior citizens.

{¶ 5} The Commission also heard from many members of the Berea community who expressed their support of the Church and urged the Commission to grant the requested variances. They pointed out how the Church's mission extends beyond its own congregation and serves the needs of the greater community. Mayor Cyril Kleem, through a letter to the Commission, expressed his support of the Church's expansion plans, noting that "the Church has made every effort to change their plans in order to meet the standards that were asked of them" and "have demonstrated that they are good neighbors and have a genuine concern for the public good and not just their own private interests."

{¶ 6} In turn, the Commission also heard from the neighbors, whose property is located in the same area as the Church. Although they agreed that the Church does great work, they expressed their opposition to the Church's expansion plans, emphasizing the following concerns: (1) the project is too big for the space available; (2) whether additional parking will be needed and that current parking and traffic from Sunday services is already congested; (3) the project would require cutting down trees; and (4) the Church has not properly

considered their concerns or input in developing its expansion plans. They further opposed the Church's use of the house it recently purchased on Seminary Street for any purpose other than a residence. The neighbors expressed their appreciation of the Church's need to expand but believed that there was a better way to do it, i.e., both sides needed to compromise.

{¶ 7} The Commission unanimously voted to table the application to allow the two sides further opportunity to discuss and try to resolve the differences. The Commission requested that the Church's architects meet with the neighbors to consider their stated concerns.

{¶ 8} The matter was heard again on December 11, 2008. Although the Church had revised its former plans, including, inter alia, reducing the size of the addition by nearly 1,000 square feet, removing a parking area from the front of the proposed addition, and moving the addition further away from the neighboring house's property line, the neighbors continued to express their opposition and indicated that more concessions could be given. The neighbors presented their own plan, which involved minimizing the expansion by 1,000 square feet and utilizing the house for residential purposes only. During the course of the meeting and in response to the Commission's and neighbors' stated concerns, the Church agreed to make further changes, which included removing an access driveway and submitting a new plan. The Commission then unanimously voted to table the application for a third meeting.

{¶ 9} Based on the Church's final plans for expansion, the City's building department identified nine variances that were required to allow the proposed 12,120 square foot addition, which included setback variances, a lot coverage variance, a landscaping variance, and a variance for a canopy.

{¶ 10} At the third and final meeting, the Commission considered the nine variances and ultimately approved them. On February 19, 2009, the Planning Commission approved and adopted the submitted Findings and Conclusions of Fact. The neighbors subsequently appealed the Commission's decision to the Court of Common Pleas, where the trial court ultimately upheld the Commission's decision. The neighbors now appeal to this court, raising the following four assignments of error:

{¶ 11} "I. The Cuyahoga County Court of Common Pleas erred in failing to find that the decision of the Berea Planning Commission violated Article VII of the Codified Ordinances of the City of Berea.

{¶ 12} "II. The Cuyahoga County Court of Common Pleas erred in failing to find that the Planning Commission exceeded its authority in granting the subject variances.

{¶ 13} "III. The Cuyahoga County Court of Common Pleas erred in failing to find that the decision of the Planning Commission contradicts the spirit and intent of the Zoning Code.

{¶ 14} "IV. The Cuyahoga County Court of Common Pleas erred in failing to find that a proper analysis implementing the practical difficulties standard

established in *Duncan* demonstrates that the Planning Commission improperly granted the subject variances.”

{¶ 15} For ease of discussion, we will address these assignments of error out of order.

Spirit and Intent of the Code

{¶ 16} In their third assignment of error, the neighbors argue that the trial court erred in failing to recognize that the Commission’s granting of the subject variances directly contravenes the spirit and intent of the Code.

{¶ 17} Initially, we must set forth our applicable standard of review. “A zoning board or planning commission which is given the power to grant variances is vested with a wide discretion with which the courts will not interfere unless that discretion is abused.” *Schomaeker v. First Natl. Bank of Ottawa* (1981), 66 Ohio St.2d 304, 309, 421 N.E.2d 530. Whether extraordinary circumstances exist to justify the issuance of a variance is a question of fact to be determined by the zoning board or commission. *Id.*

{¶ 18} In *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 2000-Ohio-493, 735 N.E.2d 433, the Ohio Supreme Court distinguished the standard of review to be applied by common pleas courts and appellate courts in R.C. Chapter 2506 administrative appeals. The court stated:

{¶ 19} “The common pleas court considers the ‘whole record,’ including any new or additional evidence admitted under R.C. 2506.03, and determines whether the administrative order is unconstitutional, illegal, arbitrary, capricious,

unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence. * * *

{¶ 20} “The standard of review to be applied by the court of appeals in an R.C. 2506.04 appeal is ‘more limited in scope.’ *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34, 465 N.E.2d 848. ‘This statute grants a more limited power to the court of appeals to review the judgment of the common pleas court only on “questions of law,” which does not include the same extensive power to weigh “the preponderance of substantial, reliable and probative evidence,” as is granted to the common pleas court.’ *Id.* ‘It is incumbent on the trial court to examine the evidence. Such is not the charge of the appellate court. * * * The fact that the court of appeals, or this court might have arrived at a different conclusion than the administrative agency is immaterial. Appellate courts must not substitute their judgment for those of an administrative agency or a trial court absent the approved criteria for doing so.’ *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 261, 533 N.E.2d 264.” *Henley* at 147.

{¶ 21} Based on our limited scope of review and the deference we must afford the Commission in its fact-finding role, we find no merit to the neighbors’ assignment of error.

{¶ 22} First, the neighbors fail to offer any argument as to why the Commission’s decision is contrary to the Code. See App.R. 16(A)(7).

{¶ 23} Second, the record reveals that the Commission specifically considered the intent and spirit of the Code in granting the variances. Notably, the Church's use of its property and the property's nonconforming site conditions predate the Code. The record further reveals that when the neighborhood was zoned R-SF-A, it was intended that the Church would remain a part of the neighborhood and was approved as a permitted conditional use in the district. In approving the variances, the Commission specifically found that the addition was compatible with the surrounding neighborhood, noting that the materials chosen for the addition and the architectural design were separately reviewed and approved by the Berea Heritage Architectural Review Board.

{¶ 24} The Commission also heard considerable evidence as to the benefit of the Church's presence in the community and the need for the expansion. Indeed, the Church's pastor testified that its expansion is necessary to serve the needs of its congregation, which includes, most significantly, the addition of a fellowship hall. If the Commission denied the variances, evidence exists that the Church would be forced to relocate. Although the neighbors suggest that such result may be more favorable, we cannot say that the trial court abused its discretion in recognizing that the Church's presence in the neighborhood and community is more consistent with the spirit and intent of the Code as opposed to an abandoned, vacant building.

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

Duncan Factors

{¶ 26} In their fourth assignment of error, the neighbors argue that the Church failed to meet the “practical difficulties” test set forth by the Ohio Supreme Court in *Duncan v. Middlefield* (1986), 23 Ohio St.3d 83, 491 N.E.2d 692, cert. denied, 479 U.S. 986, 107 S.Ct. 576, 93 L.Ed.2d 579, and, therefore, the trial court should not have affirmed the Commission’s decision. We disagree.

{¶ 27} Whereas a use variance is subject to higher scrutiny and requires a showing of “unnecessary hardship,” an area variance is subject to the lesser standard of “practical difficulties.” *Duncan* at 85. “[I]n reviewing an application for an area variance, where neighborhood considerations are not as strong as in a use variance, the spirit rather than the strict letter of the zoning ordinance should be observed so that substantial justice is done.” (Internal citation and quotation omitted.) *Id.* at 86.

{¶ 28} In *Duncan*, the Ohio Supreme Court explained the “practical difficulties” test as follows:

{¶ 29} “While existing definitions of ‘practical difficulties’ are often nebulous, it can safely be said that a property owner encounters ‘practical difficulties’ whenever an area zoning requirement (e.g., frontage, setback, height) unreasonably deprives him of a permitted use of his property. The key to this standard is whether the area zoning requirement, as applied to the property owner in question, is reasonable. The practical difficulties standard differs from the unnecessary hardship standard normally applied in use variance

cases, because no single factor controls in a determination of practical difficulties. A property owner is not denied the opportunity to establish practical difficulties, for example, simply because he purchased the property with knowledge of the zoning restrictions. *Kisil*, supra, at 33, 465 N.E.2d 848; cf. *Consolidated Mgmt., Inc. v. Cleveland* (1983), 6 Ohio St.3d 238, 452 N.E.2d 1287.” *Id.* at 86.

{¶ 30} The high court further explained:

{¶ 31} “The factors to be considered and weighed in determining whether a property owner seeking an area variance has encountered practical difficulties in the use of his property include, but are not limited to: (1) whether the property in question will yield a reasonable return or whether there can be any beneficial use of the property without the variance; (2) whether the variance is substantial; (3) whether the essential character of the neighborhood would be substantially altered or whether adjoining properties would suffer a substantial detriment as a result of the variance; (4) whether the variance would adversely affect the delivery of governmental services (e.g., water, sewer, garbage); (5) whether the property owner purchased the property with knowledge of the zoning restriction; (6) whether the property owners’ predicament feasibly can be obviated through some method other than a variance; (7) whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting the variance. See, generally, 3 Anderson, *American Law of Zoning* (2 Ed.1977),

Variances, Section 18.47 et seq.; *Wachsberger v. Michalis* (1959), 19 Misc.2d 909, 191 N.Y.S.2d 621.” Id.

{¶ 32} Our review of the record reveals that the Commission considered the *Duncan* factors and further concluded that the evidence weighed in favor of granting the subject variances under every factor except one. The trial court subsequently found that the Commission properly applied the *Duncan* factors and that its decision was supported by a preponderance of reliable, probative, and substantial evidence. Although the neighbors present arguments as to why each factor should militate against granting the variances, the Church presented evidence contradicting the neighbors’ claims and evidence of the practical difficulties the property faces. To the extent that the Commission found the Church’s evidence and arguments more compelling, we cannot substitute our judgment on appeal. See *Kisil* at 34. Nor can we say as a matter of law that the decision of the trial court to affirm the decision of the Commission was not supported by a preponderance of reliable, probative, and substantial evidence.

{¶ 33} Indeed, the record here supports the conclusion that a strict application of the zoning requirements in this case would not be reasonable. The Church presented evidence that it cannot meet the needs of its congregation without the expansion. Given that the Church has been a resident of the neighborhood for over 108 years, it is understandable that the Commission would want to see its continued viability in the neighborhood and community. We cannot say the mere number of variances renders it substantial

when considered in context of the unique circumstances and conditions of the property. And the evidence reveals that the Church’s final plan was the maximum reduction to the addition that would still meet the Church’s needs. Although the neighbors presented an alternative plan to the Commission, which would have utilized less space and required fewer variances, the Church’s architect, Tom Ziska, testified that the neighbors’ plan would create a “functionally obsolete” building.¹ Finally, as discussed above, the approval of the variances is consistent with the spirit and intent of the Code.

{¶ 34} The fourth assignment of error is overruled.

Non-Conforming Use and Planning Commission’s Authority

{¶ 35} In their first assignment of error, the neighbors argue that the Commission ignored the express provisions contained in Article VII of the Berea Zoning Code, specifically, Sections 701.4 and 701.10,² which they claim prohibited the granting of the variances, and that the trial court erred in failing to recognize the unlawfulness of the Commission’s decision. The neighbors further argue in their second assignment of error that, because the Church

¹ Specifically, he highlighted that their plan utilized less space by eliminating corridors, which would require crossing through rooms to exit.

² Sections 701.4, “Non-Conforming Use of Structures, or of Land and Structures in Combination,” and 701.10, “Conditional Uses Not Non-Conforming Uses,” are set forth in the appendix.

involves a permitted conditional use, Section 807.4 expressly prohibits the granting of any variances for conditional uses under Section 807.3(a).³

{¶ 36} The neighbors, however, failed to raise these arguments to the trial court. Although the neighbors did raise an argument related to Sections 701.4 and 701.10 in their motion to file a reply brief *instanter*, this motion was filed on the *same day* that the trial court issued its opinion and *after* the trial court had issued an order stating that the neighbors were not permitted to file a reply brief because of their repeated requests for continuances.⁴ These arguments were therefore never timely placed before the trial court for its consideration. Likewise, the neighbors' second assignment of error, challenging the Commission's authority to grant the variances, was not raised below to the trial court. We therefore review these assignments of error under a plain error analysis.

{¶ 37} "In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court,

³ Section 807.3, "Requirements for Grant of Variance," sets forth the criteria for granting a variance. Under the first subsection, the provision lists six criteria that must be met before a variance may be approved.

⁴ We note that the neighbors' argument in the trial court focused solely on Section 701.5; "Non-Conforming Lot or Structure." This provision applies to a "permitted principal use" and therefore is inapplicable to the Church, which is a "permitted conditional use." The neighbors raised no timely argument related to Sections 701.4, "Non-Conforming Use of Structure, or of Land and Structures in Combination," or 701.10, "Conditional Uses Not Non-Conforming Uses," in the trial court.

seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.” *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 679 N.E.2d 1099, syllabus. Based on the record before us, we cannot say that this is the rare case that requires us to invoke the plain error doctrine.

{¶ 38} Under Section 501.1 of the Berea Zoning Code (“Code”), religious facilities, such as the Church, are limited to a maximum lot coverage of 35 percent. When the Code was adopted, the Church’s lot coverage was 46.2 percent and remains that way today. The crux of the neighbors’ first assignment of error is that although the “grandfathering clause” under Section 701.4 lawfully allows the Church’s current legal non-conforming lot coverage, Article VII of the Code disallows any expansion of such non-conformity.

{¶ 39} Notably, the neighbors’ actions in the proceedings below contradict what they are arguing here. During the final hearing held on the Church’s application, the neighbors submitted their own proposed plan for the Church’s addition. The significant difference between their plan and the Church’s application was that the neighbors’ proposed plan utilized only 52.2 percent of lot coverage, as opposed to the Church’s request of 59.4 percent. But even under the neighbors’ plan, the lot coverage increased and required the Commission to approve three variances. The neighbors further represented that if the Church agreed to follow their proposed plan, they would withdraw any objections. Thus,

by their own submission, the neighbors recognized that the Church could expand its current facility by obtaining variances.

{¶ 40} Even if the neighbors' interpretation of Article VII is correct, it fails to consider the Commission's authority under Article VIII, which allows it to grant variances if certain conditions are met. Indeed, a variance permits a property owner to use his property in a manner that is prohibited by zoning regulations. *Nunamaker v. Jerusalem Twp. Bd. of Zoning Appeals* (1982), 2 Ohio St.3d 115, 118, 443 N.E.2d 172. A variance results in a departure from the literal enforcement of a zoning ordinance or resolution. *Id.* Further, we do not find that the Commission's grant of the variances amounts to plain error in contravention of Section 807.4(a)(ii).⁵ The neighbors' interpretation of Section 807.4(a)(ii) conflicts with the spirit of the Code and defies common sense. We are guided by two important principles: (1) zoning ordinances must be construed in favor of the property owner and against the state; and (2) an ordinance must be construed in a manner that comports with common sense and reason and that does not result in an absurd result. See *BP Oil Co. v. Dayton Bd. of Zoning Appeals* (1996), 109 Ohio App.3d 423, 672, N.E.2d 256; *Mishr v. Bd. of Zoning Appeals of Village of Poland* (1996), 76 Ohio St.3d 238, 667 N.E.2d 365.

{¶ 41} Here, the neighbors' contention would operate to bar any variance with respect to any permitted conditional use. Thus, despite the Church having

⁵ This provision provides that "[n]o variance shall be granted pursuant to subsection 807.3(a) * * * [w]ith respect to regulations or other requirements in this Code

occupied its site since before the Code was enacted, the neighbors' interpretation would preclude any variance from being approved, no matter how small or necessary. Such interpretation is unduly restrictive and inconsistent with the spirit of the Code. At a very minimum, we cannot say that the Commission's consideration and granting of the variances constitutes plain error.

{¶ 42} The neighbors' first and second assignments of error are overruled.

Judgment affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
COLLEEN CONWAY COONEY, J., CONCUR

APPENDIX

for conditional uses.”

A. Section 701.4 provides in relevant part:

“If at the effective date of this Code or future amendment, there exists a lawful use of an individual structure with a replacement cost on such effective date of Two Thousand Dollars (\$2,000) or more or a lawful use of land and any such structure in combination, but such use is not a permitted principal use (nor an accessory use to permitted principal use) in the district in which it is located under the terms of this Code as adopted or so amended, the lawful use may be continued, except as otherwise specifically provided in this Code, so long as it remains otherwise lawful, subject to the following provisions:

“(a) No existing structure devoted to a use not permitted by this Code in the district in which it is located shall be erected, constructed, reconstructed, enlarged, moved or structurally altered except in changing the use of the structure and the land used in combination therewith to a use permitted in the district in which it is located and in conformity with the regulations generally applicable to such use in such district.

“(b) Any non-conforming use may be extended throughout any parts of an existing building which were manifestly arranged or designed for such use at the effective date of this Code or future amendment, but no such use shall be extended to occupy any land outside such building, nor shall accessory uses be added which would not be permitted elsewhere in the district; * * *.”

B. Section 701.10 provides as follows:

“Any use which is specified in Article II, III or IV as a permitted conditional use in a zoning district and which is approved as a conditional use for a particular zoning lot in accordance with the administrative provisions of Article VIII (but not, however, a use of a non-conforming structure, or a substitute non-conforming use, approved as a conditional use pursuant to Section 701.4 or 701.5) shall not be deemed a non-conforming use in such district but shall without further action be considered a conforming use.”