[Cite as *Cuyahoga Community College Dist. v. Highland Hills*, 2010-Ohio-5606.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94560

CUYAHOGA COMMUNITY COLLEGE DISTRICT

PLAINTIFF-APPELLANT

vs.

THE VILLAGE OF HIGHLAND HILLS

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Administrative Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-673057

BEFORE: Stewart, J., Rocco, P.J., and Dyke, J.

RELEASED AND JOURNALIZED: November 18, 2010

ATTORNEYS FOR APPELLANT

Theodore M. Dunn, Jr.
Donet D. Graves
Heidi J. Milicic
Buckley King, LPA
1400 Fifth Third Center
600 Superior Avenue, East
Cleveland, OH 44114

ATTORNEYS FOR APPELLEE

Charles T. Riehl
Aimee W. Lane
Walter & Haverfield, LLP
The Tower at Erieview
1301 East Ninth Street, Suite 3500
Cleveland, Ohio 44114

Thomas P. O'Donnell
Law Director
Village of Highland Hills
3700 Northfield Road, Suite 11
Cleveland, OH 44122

MELODY J. STEWART, J.:

{¶ 1} Plaintiff-appellant, Cuyahoga Community College District ("CCC" or "appellant"), appeals the trial court's order affirming the decision of defendant-appellee, The Village of Highland Hills Board of Zoning Appeals ("BZA" or the "Board"), that upheld the order of Highland Hills Zoning

Administrator, Larry Finch ("Administrator" or "Finch"), denying CCC's application for a zoning permit to change the use of its property from a skilled nursing facility to a public community college use. Appellant asks this court to reverse the decision of the trial court or, alternatively, to remand the matter for an evidentiary hearing. For the reasons stated below, we affirm.

{¶ 2} In February 2007, the Village Council, upon recommendation from the Village Planning Commission, passed Ordinance No. 2006-34 enacting Chapter 1122 of the Village's Codified Ordinances. This ordinance created a new zoning district entitled New Community Planned Development district (NCPD). The ordinance also intended to rezone a parcel of land located on Richmond Road that was owned by Cuyahoga County and used as the MetroHealth Long Term Nursing Care facility from its prior institutional district zoning into the new zoning district.[1] The stated purpose of the ordinance was to rezone the property so as to permit other uses, including a mix of residential and commercial development, and to return the land to a taxable status and thus provide the village, the county, and the local school district with much needed revenue. To further this purpose, tax-exempt land used in the NCPD district was limited to 30% of the gross project area.

---

[1]Appellant asserts that the ordinance failed to rezone the property, however, as we note below, this issue has yet to be decided.

{¶ 3} In December 2007, CCC purchased the property from the county and, in June 2008, submitted an application for a zoning permit. The application listed the property's zoning as an institutional district except for a ten acre corner of the property zoned office district. The application stated the existing use as "MetroHealth Skilled Nursing Facility," and the proposed use as, "Public Community College educational institution for academic instruction." There was no mention of the new NCPD district designation. The application stated that CCC had no plans to occupy or use any of the existing buildings on the property, with the exception of an accessory maintenance building, and that it had made no final determination as to the use of the buildings but would apply for "all applicable permits for the use of the property" in the future as required. Under the heading "percentage of lot to be occupied," CCC wrote "one hundred percent (100%) to be used for College purposes including all 'open space.'"

{¶ 4} Finch was confused by the application because it did not propose to change anything; the property and buildings were vacant or open space when CCC purchased the land and CCC's application proposed to keep them that way. He initially concluded that CCC was requesting a zoning district amendment and advised CCC that it had failed to provide the information required by Chapter 1149 of the Zoning Code for such an amendment. Upon further inquiry and review, and after CCC assured him that they were

seeking a zoning permit, Finch denied the application based upon his determination that the application for a zoning permit was incomplete and premature based upon CCC's statements that it had no plans to occupy the existing building or to make any improvements to the land at that time. CCC appealed the denial of the permit to the BZA. The BZA set the matter for public hearing.

{¶ 5} At the hearing, CCC presented the Board with details and drawings showing CCC's plans to develop the property in three phases over a ten-year period. These plans included what CCC termed "MetroHealth remediation and demolition," as well as the addition of new buildings, an outdoor amphitheater, and expansion of recreational facilities. In response to the Board's questions, CCC confirmed that none of this information was provided to the Zoning Administrator at the time of the permit application, and that plans for the first phase were not yet complete.

{¶ 6} Following deliberations, the Board voted to deny the appeal and issued its decision and findings of fact. CCC filed a notice of appeal with the common pleas court. The common pleas court affirmed the BZA's order, finding that the board's decision was not "unconstitutional, illegal, arbitrary or capricious, unreasonable, nor unsupported by a preponderance of substantial, reliable, and probative evidence on the whole record." CCC then filed its notice of appeal with this court raising five errors for review.

Standard of Review

{¶ 7} CCC's appeal from the Board's decision is governed by R.C. Chapter 2506. R.C. 2506.04 states that if an appeal is brought under R.C. 2506.01, the court of common pleas must determine if the order or decision of the administrative board or agency is "unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record." The trial court may weigh the evidence and can base a reversal on the evidence only when the record lacks a preponderance of reliable, probative, and substantial evidence to support the agency's decision. *Dudukovich v. Lorain Metro. Hous. Auth.* (1979), 58 Ohio St.2d 202, 207, 389 N.E.2d 1113.

{¶ 8} A court of appeals has an even more deferential standard of review. As the Supreme Court of Ohio stated in *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147, 2000-Ohio-493, 735 N.E.2d 433:

{¶ 9} "The standard of review to be applied by the court of appeals in an R.C. 2506.04 appeal is '*more limited in scope*.' (Emphasis added.) *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34, 12 OBR 26, 30, 465 N.E.2d 848, 852. '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. at fn. 4. '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, 267."

{¶ 10} Our review of "questions of law" is essentially a question of whether the trial court abused its discretion when determining whether the board's decision is supported by reliable, probative, and substantial evidence. *Henley* at 148; *N. Coast Payphones, Inc. v. City of Cleveland, Bd. of Zoning Appeals*, 8th Dist. No. 88244, 2008-Ohio-310. An abuse of discretion connotes more than an error of law or judgment; it implies an unreasonable, arbitrary, or unconscionable attitude on the part of the trial court. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 11} Although CCC assigns five errors and raises numerous factual, legal, and constitutional issues, the scope of this appeal is actually very narrow. Pursuant to Section 1141.02 of the Village's zoning code, one of the duties of the zoning administrator is to interpret and enforce the provisions of the zoning code. Section 1141.09 of the code provides that "all questions of

interpretation and enforcement shall *be first presented* to the Zoning Administrator, and that such questions shall be presented to the Board *only* on appeal from the decision of the Zoning Administrator[.]" (Emphasis added.) The zoning administrator's interpretation of the zoning regulations applicable to the permit denial are clearly stated in his July 29, 2008 letter to CCC. In that letter, Finch stated that "[t]he purposes of a zoning review and issuance of a zoning permit is to confirm that the proposed uses and land improvements comply with the limitations of the district." He explained that CCC's statements that there are currently no plans to occupy existing buildings or to add to or enlarge existing structures "preclude the ability to issue a zoning permit * * * regardless of the district under which the application is submitted." He further explained that institutional uses are permitted in both the NCPD district and in the institutional district, but that a permit is not needed at this time because the land upon which the former MetroHealth facility was located is vacant and "[n]o permit is required for the land in question to remain vacant." However, he advised CCC that it could apply for a zoning permit at an appropriate time in the future.

{¶ 12} Therefore, although CCC sought to raise "a multitude of issues" through its appeal to the BZA, including challenging whether Ordinance No. 2006-34 actually rezoned the property, whether the ordinance as applied to CCC was unconstitutional, whether the ordinance was preempted by state

law, whether CCC was immune from local zoning, and whether the proposed use is a pre-existing nonconforming use, it is clear from the record that none of these issues entered into the zoning administrator's or the BZA's determination that the application was premature. Accordingly, any findings by the BZA relating to issues other than the one of whether the Board's decision to deny CCC's appeal because the permit application was premature was in error, are dicta. See *Prijatel v. Sifco Industries, Inc.* (Feb. 5, 1976), 8th Dist. No. 34357.

{¶ 13} Accordingly, the scope of this appeal is limited to the single issue of whether the BZA properly affirmed the zoning administrator's determination that CCC's permit application should be denied because it was incomplete and premature. The trial court found that the BZA's decision was supported by a preponderance of reliable, probative, and substantial evidence. This court's function is to determine whether the trial court abused its discretion in reaching that conclusion. We will review appellant's fifth assigned error first as it is dispositive of this appeal.

{¶ 14} In the fifth assignment of error, CCC asserts that the trial court failed to apply the correct standard of review and thus erred in affirming the BZA's determination that CCC is not entitled to a zoning permit to change the use of the property from skilled nursing to college uses. CCC argues that

it was entitled to a zoning permit to be assured its "college's uses" are permitted even though it has no current plans for improvements.

{¶ 15} Appellant's argument is really one of semantics. "Use" generally means "to employ to some purpose." Therefore, while the zoning code lists "permitted uses" for each district, these are the general purposes to which the property in each zoning district may be employed. The code also contains detailed provisions to regulate the manner in which the property may be employed or developed to those purposes. A zoning permit application must provide sufficient information as to both so that the zoning administrator can determine if the proposed use complies with the zoning code. See Section 1143.02.

{¶ 16} As an example, in *Alabaugh v. Eagle*, 3rd Dist. No. 13-09-01, 2009-Ohio-2308, a case cited by appellant, the owners of a private residence applied for a permit to change the use of their residence to a country club. In their application the Alabaughs asserted that "country club" was one of the permitted uses in the zoning district where the property was located and, therefore, they were entitled to a zoning permit for the change in use. The zoning inspector denied the permit. The BZA then denied the applicants' appeal and the common pleas court affirmed the BZA's decision.

{¶ 17} On further appeal, the appellate court stated: "The issues presented by this case are whether the Tiffin City Code required the

Alabaughs to obtain a permit before they changed the use of their zoned property and whether the proposed use satisfied the definition of a 'country club.'" The court found that a permit was required for the change in use, but that the manner in which the Alabaugh's intended to use the property did not comply with the definition of a country club. In their permit application the Alabaughs stated, "we would operate essentially as we have for the past 3 years as a tea room-i.e., serving the community luncheon teas and tea brunches, high teas, victorian teas, bridal teas, and host various clubs, meetings, anniversary celebrations, birthdays, baby showers, etc. including religious services (baptisms, etc.)." Id. at 7. The court found that the zoning code defined a tea room as a restaurant, which was not a permitted use in the property's zoning district. Therefore, the court concluded that the zoning inspector and the BZA were correct in refusing to issue a permit where the applicants incorrectly classified their proposed use to get around zoning restrictions.

{¶ 18} The difference between the instant case and *Alabaugh* is that the zoning inspector in *Alabaugh* had sufficient information to determine whether the applicants' proposed use complied with zoning requirements. In the instant case, the BZA found that the "zoning permit application was premature" because "CCC did not submit a plan or any information regarding the proposed use of the property." The Board further found that "CCC

testified that its plans for the property were still in the process of being developed. These incomplete plans were never presented to the Zoning Administrator in conjunction with CCC's application." Therefore, the Board concluded, "The Zoning Administrator was unable to evaluate whether the proposed use complied with the use restrictions, setback regulations, and other requirements of the zoning district and, therefore, had no choice but to deny the application."

{¶ 19} On its permit application, CCC noted the proposed use as "Public Community College education institution for academic instruction" and stated that "100% to be used for College purposes including open spaces." The plans submitted showed the property as it existed when CCC purchased it from Cuyahoga County. A letter submitted with the application stated:

{¶ 20} "There is currently no plan to occupy any of the existing buildings except the maintenance building. Further, there is no plan to add to, or enlarge, any existing structure. The buildings are secured and regularly patrolled by College security at all times.

{¶ 21} "Please be aware that at the time of this writing the College has not made a final determination as to what use, if any, will be made of the existing structures. At the appropriate time the College will seek all applicable permits for the use of the property in the event that in the future there will be: (i) a desire to utilize the structures (in addition to the

maintenance building), (ii) a material change in any existing structures, and/or (iii) development of new structures on this particular parcel."

{¶ 22} The zoning code states that, "No building or other structure shall be erected, moved, added to, structurally altered, nor shall any building, structure, or land be established or changed in use without a permit therefor, issued by the Zoning Administrator. Zoning Permits shall be issued only in conformity with the provisions of this Ordinance * * *." Section 1143.01. Section 1143.02 lists the information that must be included with the permit application and calls for the submission of plans showing the location and dimensions of proposed buildings or alterations, parking spaces, access drives, signs, landscape plans, and "[s]uch other documentation as may be necessary to determine conformance with, and to provide for the enforcement of this Ordinance." Based upon the lack of any specific information relating to the manner in which CCC planned to use or develop the land and existing buildings, other than a general statement that it would use all of its property for college use, we do not find that the trial court abused its discretion when determining that the Board's decision is supported by reliable, probative, and substantial evidence.

{¶ 23} As explained below, we find appellant's remaining assignments of error are not properly before this court as they are not ripe for review.

{¶ 24} In the first assignment of error, CCC claims that the BZA incorrectly determined that Ordinance No. 2006-34 rezoned the property from institutional district to New Community Planned Development district. CCC argues that neither the official zoning map nor the text of the zoning ordinance provide that the property was rezoned. In the second and third assignments of error, CCC raises constitutional challenges to the New Community Planned Development district's 30% limitation on tax-exempt land use. CCC argues that the 30% use limitation is unconstitutional as applied to it and, that while the 30% limitation is fashioned as a regulation of use, its effect is to regulate whether CCC can own property within the district. CCC also contends that because it is statutorily exempted from paying real estate taxes, the Village's zoning code conflicts with and is preempted by Chapter 3354. Finally, in the fourth assignment of error, CCC asserts that the trial court erred in affirming that the BZA does not have the authority to determine that CCC's use of the property is a pre-existing nonconforming use. CCC argues that the county's prior use of the property for a hospital was 100% tax exempt and, therefore, even if the 30% limitation on tax exempt property use in the NCPD district is found to be valid, CCC's use of the property is a continuation of a prior nonconforming use.

{¶ 25} The validity of a zoning regulation can be attacked in two ways: (1) an appeal from an administrative zoning decision, pursuant to R.C.

Chapter 2506; and (2) a declaratory judgment, pursuant to R.C. Chapter 2721. *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 526 N.E.2d 1350, paragraph one of the syllabus. The difference between the two methods is that, the "denial of a specific proposed purpose is pivotal to the ripeness determination in an R.C. Chapter 2506 proceeding but not to the ripeness determination in a declaratory judgment action pursuant to R.C. Chapter 2721." Id. at 15.

{¶ 26} CCC chose to challenge the ordinance through a Chapter 2506 administrative appeal of the zoning administrator's decision rather than through a declaratory judgment action. The BZA's decision, however, did not deny a "specific proposed purpose." The record reflects that the permit was denied not because CCC's proposed use failed to conform to the requirements of a particular zoning district, or because it was not a continuation of a pre-existing nonconforming use. Rather, the permit application was denied because the zoning administrator could not determine from the information provided with the application how CCC proposed to use the property. After hearing testimony and receiving evidence from both sides, the BZA agreed that the application was incomplete and premature. Accordingly, the issues raised in appellant's first four assignments of error challenging the validity of Ordinance No. 2006-34 and raising issues not properly before the BZA for determination, are not ripe for review.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas 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.

____
MELODY J. STEWART, JUDGE

KENNETH A. ROCCO, P.J., and
ANN DYKE, J., CONCUR