

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

JAMES M. SUMNER, et al.,	:	OPINION
Appellants,	:	
- vs -	:	CASE NOS. 2012-P-0019,
	:	2012-P-0020,
	:	and 2012-P-0021
CITY OF KENT, et al.,	:	
Appellees.	:	

Civil Appeals from the Court of Common Pleas, Case Nos. 2011 CV 0208, 2011 CV 0209, and 2011 CV 0210.

Judgment: Affirmed.

Joseph R. Spoonster, Fortney & Klingshirn, 4040 Embassy Parkway, Suite 280, Akron, OH 44333 (For Appellants).

James R. Silver, City of Kent Law Director, and *Eric R. Fink*, Assistant City of Kent Law Director, 215 East Summit Street, Kent, OH 44240 (For Appellees).

TIMOTHY P. CANNON, P.J.

{¶1} Appellants, James M. and Diana M. Sumner, appeal from a decision of the Portage County Court of Common Pleas, affirming the variances and conditional zoning certificate granted to appellees, the city of Kent (“Kent”) and its Parks and Recreation Department (“Parks and Recreation”), by the city of Kent Board of Building Appeals (“Building Appeals”), the Board of Zoning Appeals (“Zoning Appeals”), and the Planning and Zoning Commission (“Planning Commission”). Parks and Recreation sought to

construct a 12-car lot and a path made of pervious materials leading toward the Cuyahoga River “to provide access for canoes and kayaks to the river.” We find the granting of the variances and conditional zoning permit to be supported by substantive, reliable, and probative evidence, and that the trial court did not abuse its discretion in affirming these determinations. Therefore, we affirm the judgment of the Portage County Court of Common Pleas.

{¶2} Kent obtained a 6.2 acre parcel located on the Cuyahoga River from a developer of a surrounding development. Appellants’ parcel and residence is directly across the Cuyahoga River. This parcel is zoned “O-R: Open Space – Recreational District.” This zoning designation allows parks as a conditional use.

{¶3} The Director of Parks and Recreation explained the primary purpose of constructing the “River Bend Park” was to provide canoe and kayak access to the upper Cuyahoga River.

{¶4} Originally, the plan consisted of a 20-car lot and trailer facilities to launch small motor boats on the Cuyahoga River; however, after several public meetings and lengthy discussions with local residents and neighbors to the park, the number of spaces decreased to 12. Further, motorized boats were excluded from the plan, and the proposed lighting was altered to be less intrusive. The Ohio Department of Natural Resources awarded Kent a grant for this project.

{¶5} Parks and Recreation sought the following variances from Zoning Appeals:

{¶6} 1. A 51-foot variance from the 100-foot activity setback requirement to allow a parking area to be 49 feet from the front property line along River Bend Boulevard (Section 1171.01), and

{¶7} 2. A variance to allow parking within the front yard setback (Section 1167.10(a)).

{¶8} Parks and Recreation also sought a variance with Building Appeals to allow a small parking lot to be constructed within the 200-foot riparian setback required for floodplains.

{¶9} Additionally, Parks and Recreation filed for a conditional zoning certificate and site plan review with the Planning Commission to allow a driveway, parking lot, and access path to the river at the planned park.

{¶10} After hearings were held, the agencies approved the variances and conditional zoning certificate.

{¶11} Appellants appealed the decisions to the Portage County Court of Common Pleas. In a lengthy judgment entry, the trial court found “the decisions reached by the Boards and Commission are lawful, reasonable, and supported by the preponderance of the substantial, reliable, and probative evidence on the whole record. Thus, the variances, conditional use certificate, and site plan approval granted to the Parks and Recreation must be affirmed.”

{¶12} Appellants now appeal. Before we address appellants’ assignments of error, we must consider our standard of review. First, upon review of an administrative appeal, a court of common pleas considers whether the decision to grant or deny a certificate is supported by “the preponderance of substantial, reliable, and probative

evidence on the whole record.” R.C. 2506.04. This court’s review of the judgment of the trial court is more limited than that of the court of common pleas. *Henley v. City of Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147 (2000). This court’s review is whether, as a matter of law, the decision of the court of common pleas is supported by a preponderance of reliable, probative, and substantial evidence. *Kisil v. Sandusky*, 12 Ohio St.3d 30, 34 (1984). “While the court of common pleas has the power to weigh the evidence, an appellate court is limited to reviewing the judgment of the common pleas court strictly on questions of law.” *Carrolls Corp. v. Willoughby Bd. of Zoning Appeals*, 11th Dist. No. 2005-L-110, 2006-Ohio-3411, ¶10, quoting *Akwen, Ltd. v. Ravenna Zoning Bd. of Appeals*, 11th Dist. No. 2001-P-0029, 2002-Ohio-1475, ¶17.

{¶13} In their first assignment of error, appellants assert:

{¶14} “The trial court’s decision affirming the variances granted by the BBA and the BZA is not supported by a preponderance of reliable, probative and substantial evidence, is an abuse of discretion, and is not supported by law.”

{¶15} Appellants first maintain that Building Appeals does not have legal authority to issue a variance to Parks and Recreation. Appellants argue Building Appeals only has the authority to grant a variance from the riparian regulations to residential dwellings. To support this assertion, appellants cite to Kent City Codified Ordinance (“KCO”) 1309.04, which states, in part: Building Appeals “shall have the following powers and perform the following duties *in regard to one, two and three family dwellings and accessories thereto[.]*” Chapter 13 is the Building Code for Kent and applies only to appeals arising out of the Building Code. As observed by the trial court,

this section “simply imports the procedures to be used by Building Appeals; not a limitation of scope of the Board’s jurisdiction.”

{¶16} Appellants also argue the Building Appeals grant of the variance to Parks and Recreation is in violation of the riparian restrictions because “the construction of a parking lot in the middle of the riparian setback necessarily requires the constructions of a driveway and operation of motor vehicles within the riparian setback.” Appellants cite KCO 1201.03(f)(4) which states, in part: “There shall be no roads or driveways permitted in riparian and/or wetland setback area, except as permitted under Subsection (e).” We note, however, that subsection (e) permits roads and/or driveways designed to facilitate any of the purposes outlined by the Ordinance, including passive recreational uses, such as “hiking, fishing, hunting, picnicking, and similar uses.” KCO 1201.03(e)(1)(ii). Further, the Ordinance permits gravel (pervious) driveways in riparian setbacks when necessary. KCO 1201.04(c). The record demonstrates that pervious pavement would be utilized on the parking area to limit impacts from stormwater runoff.

{¶17} Appellants’ first assigned error is without merit.

{¶18} Appellants’ second assignment of error states:

{¶19} “The trial court’s determination that the variances granted by the BBA and the BZA complied with *Duncan* is not supported by a preponderance of reliable, probative and substantial evidence, is an abuse of discretion, and is not supported by law.”

{¶20} Under their second assigned error, appellants maintain the variances do not satisfy the *Duncan* factors. Further, appellants state Parks and Recreation did not

suffer “practical difficulties,” and the application of the zoning requirements is not inequitable in this case.

{¶21} In *Duncan v. Middlefield*, 23 Ohio St.3d 83 (1986), syllabus, the Ohio Supreme Court stated:

{¶22} 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 owner’s 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.

{¶23} In reviewing the decision of the Zoning Appeals and Building Appeals, the trial court set forth the evidence present in the record and then analyzed it in accordance with all of the factors set forth in *Duncan*. As this court has recognized,

“[a]lthough evidence was submitted to support both sides of the issue, the trial court was obligated to defer to the determination of the [Board of Zoning Appeals], so long as it was not unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable and probative evidence.” *Schultz v. Village of Mantua*, 11th Dist. No. 2011-P-0054, 2012-Ohio-1459, ¶28.

{¶24} We, therefore, cannot say the trial court abused its discretion in finding substantive, reliable, and probative evidence to support the Zoning Appeals and Building Appeals granting of the three variances.

{¶25} Appellants’ second assignment of error is without merit.

{¶26} Appellants’ third assignment of error states:

{¶27} “The trial court’s determination that the BBA considered all factors required by KCO 1201.04 is not supported by a preponderance of reliable, probative and substantial evidence, is an abuse of discretion, and is not supported by law.”

{¶28} Under this assigned error, appellants allege the Building Appeals failed to consider the factors set forth in KCO 1201.04 when considering whether to grant the variance. KCO 1201.04 requires the Building Appeals to “consider the harm or reduction in riparian and/or wetland area functions that may be caused by a proposed structure or use.” Further, KCO 1201.04(b) delineates seven considerations that the Building Appeals shall consider when making a variance determination. Those considerations include, inter alia, “the soil type natural vegetation of the parcel,” “the degree of hardship the regulation places on the landowner,” “the availability of alternatives,” “the presence of significant impervious cover or smooth vegetation,” and “a parcel existing at the time of the passage of [the] ordinance is made unbuildable.”

{¶29} In its judgment entry, the trial court recognized that the Building Appeals considered all the relevant factors in the Ordinance. The trial court then cited to the evidence in the record that demonstrates the Building Appeals considered the above factors. We find that the decision of the trial court is supported by a preponderance of reliable, probative, and substantial evidence.

{¶30} Appellants' third assignment of error is without merit.

{¶31} Appellants' fourth assignment of error states:

{¶32} "The trial court's determination that the BZA considered all factors required by KCO 1115.09 is not supported by a preponderance of reliable, probative and substantial evidence, is an abuse of discretion, and was not supported by law."

{¶33} Appellants maintain the Zoning Appeals failed to make specific findings as required by KCO 1115.09(b)(3). The Zoning Appeals found the following:

{¶34} "The BZA finds and concludes that the substantial grade and slope of the land creates an exceptional circumstance, that there is a hardship, that the parking lot would not be a detriment to the neighborhood or surrounding properties, and that the strict application of the zoning code would resulting [sic] practical difficulties."

{¶35} In its entry, the trial court recognized that the Zoning Appeals considered all the factors enumerated in KCO 1115.09. The trial court then cited to the evidence in the record that demonstrates the Zoning Appeals considered the above factors. We find that the decision of the trial court is supported by a preponderance of reliable, probative, and substantial evidence.

{¶36} Thus, appellants' fourth assignment of error is without merit.

{¶37} Appellants' fifth assignment of error states:

{¶38} “The trial court’s decision affirming the Planning Commission’s grant of a Conditional Zoning Certificate is not supported by a preponderance of reliable, probative and substantial evidence, is an abuse of discretion, and is not supported by law.”

{¶39} Appellants maintain that a boat launch is not a conditionally-permitted use allowed in an Open Space-Recreational District, and therefore, the Planning Commission did not have the authority to issue a conditional zoning certificate. As observed by appellees, the Planning Commission found that a “park with a parking lot is an allowed conditional use.” No structure or improvement was made to the property except the 12-space parking lot. As stated by the trial court, “a conditional zoning certificate and site plan review to Parks and Recreation allowed construction of a driveway, parking lot, access path, and ramp.” Further, as previously stated, KCO 1201.03(e)(1)(ii) permits roads and/or driveways designed to facilitate any of the purposes outlined by the Ordinance, including passive recreational uses, such as “hiking, fishing, hunting, picnicking, and similar uses.”

{¶40} Next, appellants argue that according to the Ordinance, all “structures and activity areas shall be located at least 100 feet from all property lines.” However, Parks and Recreation sought and was granted two variances from Zoning Appeals. Appellants argue the rip-rap retaining wall does not comply with the 100-foot setback, but the trial court determined that the planned walkway, ramp, and bank stabilization are not “structures” as defined in the Ordinance. The trial court reasoned that as defined in the Ordinance, structures include “buildings, mobile homes, walls, and billboards,” and further, other references to “structure” in the Ordinance refer to buildings and similar

things erected above ground. Given the language in the conditional use section, it is reasonable for the trial court to arrive at this conclusion.

{¶41} We cannot say the trial court abused its discretion in finding substantive, reliable, and probative evidence to support the Planning Commission's grant of the conditional zoning certificate.

{¶42} Appellants' fifth assignment of error is without merit.

{¶43} Based on the opinion of this court, the judgment of the Portage County Court of Common Pleas is hereby affirmed.

DIANE V. GRENDALL, J.,

MARY JANE TRAPP, J.,

concur.