[Cite as *Franks v. Granville*, 2017-Ohio-7004.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BARBARA FRANKS, ET AL. Plaintiffs-Appellants -vs- VILLAGE OF GRANVILLE, ET AL. Defendants-Appellees	JUDGES: Hon. Patricia A. Delaney, P.J. Hon. William B. Hoffman, J. Hon. Craig R. Baldwin, J. Case No. 16-CA-101 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas, Case No. 16CV00337
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	July 21, 2017

APPEARANCES:

For Plaintiffs-Appellants	For Defendants-Appellees
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Hoffman, J.

{¶1} Plaintiffs-appellants Barbara Franks, et al. appeal the October 31, 2016 Judgment Entry entered by the Licking County Court of Common Pleas, which affirmed the decision of the Granville Village Council, denying Appellants' application for a variance. Defendants-appellees are the Village of Granville, et al.

STATEMENT OF THE CASE AND FACTS

{¶2} Appellants are the owners and operators of "Footloose", a retail vintage clothing store, and "Taco Dan's", a restaurant, located in a three story house at 119 South Prospect Street in Granville, Ohio. Appellants also own a barn located at 123 South Prospect Street ("the Barn"), which is situated at the rear of the 119 South Prospect Street property. In 2009, the Granville Board of Zoning and Building Appeals ("BZA") designated the Barn as an accessory use to the clothing store for the storage of merchandise. Because of the designation as an accessory use, the BZA did not impose additional parking requirements.

{¶3} Appellants renovated the Barn to expand the seating of the restaurant in order to accommodate handicapped patrons. The Village Planner advised Appellant Franks she would need to provide four off-street parking spaces because she was converting 768 square feet of the Barn from an accessory use to a restaurant use. Pursuant to Granville Planning and Zoning Code Section 1183.03, a restaurant use is required to provide one off-street parking space for every 200 square feet of restaurant floor space.

{¶4} On March 23, 2015, Appellants filed an application with the BZA, seeking a variance to reduce the number of off-street parking spaces required by the expansion of the restaurant from four to zero. Following a hearing on Appellants' application, the BZA denied the application on January 14, 2016. Appellants appealed the BZA's decision to the Village Council, which affirmed the decision of the BZA on April 6, 2016. Appellants filed a timely appeal of the Council's decision to the Licking County Court of Common Pleas.

{¶5} The trial court implemented a briefing schedule, and the parties filed their respective briefs according thereto.

{¶6} Via Judgment Entry filed October 31, 2016, the trial court affirmed the decision of the Village Council. The trial court found the Village Council's concerns were not unreasonable. The trial court further found the weight the Village Council gave to the factors set forth in *Duncan v. Middlefield,* 23 Ohio St.3d 83, 85–86, 491 N.E.2d 692 (1986), in determining Appellants would not experience "practical difficulties" if the variance was not granted, was supported by the record, and not unreasonable, unlawful, or arbitrary. The trial court concluded Appellants were not denied equal protection.

{¶7} It is from this judgment entry Appellants appeal, raising the following assignments of error:

I. THE TRIAL COURT ERRED WHEN IT ADMITTED EVIDENCE THAT WAS NOT IN THE ADMINISTRATIVE RECORD.

II. THE TRIAL COURT ERRED WHEN IT AFFIRMED THE DECISION OF THE GRANVILLE VILLAGE COUNCIL.

I

{¶8} In their first assignment of error, Appellants contend the trial court erred in admitting evidence which was not in the administrative record. Specifically, Appellants submit the trial court considered and relied upon evidence of the Village Council's recent denial of a parking variance requested by a CVS Pharmacy in determining Appellants were not denied equal protection of the laws. Such evidence was not before the BZA or the Village Council when Appellants' application was heard.

{¶9} In its October 31, 2016 Judgment Entry, the trial court stated:

> Finally, Appellants argue that they were unfairly denied equal protection of the laws because no other parking variance application has ever been denied. The Village offered evidence that a parking variance was recently denied for another business. See Notice of Council Action filed September 20, 2016. ***Regardless***, Appellants did not establish that any of the other variance situations were substantially similar to their own. The evidence in that regard suggested Appellants' property differed from the other examples offered in that their business was located among residences and was the only business of its kind with late hours on the street. Appellants have not demonstrated that they have been denied equal protection. (Emphasis added).

{¶10} Assuming, arguendo, the trial court erred in considering and relying upon evidence of the Village Council's denial of the CVS Pharmacy parking variance, we find such error to be harmless. The trial court explicitly noted, "regardless" of the evidence of the recent denial of a parking variance, Appellants failed to establish the other variance situations, upon which they relied to support their position they were denied equal protection were substantially similar to their own situation. Because Appellants' property presented a situation different from the other properties which received variances, we find the trial court did not err in finding Appellants were not denied equal protection.

{¶11} Based upon the foregoing, we overrule Appellant's first assignment of error.

II

{¶12} In their second assignment of error, Appellants maintain the trial court erred in affirming the decision of the Granville Village Council.

{¶13} Pursuant to R.C. 2506.04, in an administrative appeal, the common pleas court considers the whole record, including any new or additional evidence, and determines whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence. In reviewing an appeal of an administrative decision, a court of common pleas begins with the presumption the board's determination is valid, and the appealing party bears the burden of showing otherwise. *Hollinger v. Pike Township Board of Zoning Appeals,* Stark App. No. 09CA00275, 2010-Ohio-5097, 2010 WL 4111162.

{¶14} As an appellate court, our standard of review in an R.C. 2506.04 appeal is "limited in scope." *Kisil v. Sandusky,* 12 Ohio St.3d 30, 465 N.E.2d 848 (1984). "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 the substantial, reliable, and probative evidence, as is granted to the common pleas court. Within the ambit of 'questions of law' for appellate court review would be abuse of discretion by 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 * * * 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.,* 40 Ohio St.3d 257, 261, 533 N.E.2d 264 (1988). Ultimately, the standard of review for appellate courts in a R.C. 2506 appeal is "whether the common pleas court abused its discretion in finding that the administrative order was or was not supported by reliable, probative, and substantial evidence." See *Weber v. Troy Twp. Board of Zoning Appeals,* 5th Dist. Delaware No. 07 CAH 04 0017, 2008-Ohio-1163, 2008 WL 697384.

{¶15} "The standard of review for courts of appeals in administrative appeals is designed to strongly favor affirmance" and "permits reversal only when the common pleas court errs in its application or interpretation of the law or its decision is unsupported by a preponderance of the evidence as a matter of law." *Cleveland Clinic Foundation v. Cleveland Board of Zoning Appeals,* 141 Ohio St.3d 318, 2014-Ohio-4809, 23 N.E.3d 1161.

{¶16} Appellants predicate this assignment of error on two grounds. First, Appellants submit the trial court erred in affirming the decision of the Village Council because they were denied equal protection of the laws as the Village Council "routinely

and consistently approves parking variances for residents, businesses, a museum and religious organizations in or near" the Village Business District. Brief of Appellants at 12. Second, Appellants maintain the trial court erred in affirming the decision because such was not supported by a preponderance of the evidence.

{¶17} We begin by addressing Appellants' second claim. Appellants sought to change the use of the Barn from an accessory use, which requires zero off-street parking spaces, to a restaurant use, which requires four off-street parking spaces.

{¶18} The Ohio Supreme Court has delineated two standards depending on the type of variance at issue: (1) the "practical difficulties" standard for granting a variance that relates only to area requirements and (2) the "unnecessary hardship" standard for granting a variance that relates to a use variance. *Kisil* at 32–33, 465 N.E.2d 848; *Duncan v. Middlefield,* 23 Ohio St.3d 83, 85–86, 491 N.E.2d 692 (1986). In adopting the lesser practical difficulties standard, the Ohio Supreme Court explained: "[w]hen the variance is one of area only, there is no change in the character of the zoned district and the neighborhood considerations are not as strong as in a use variance.' " *Kisil* at 33, 465 N.E.2d 848, quoting *Hoffman v. Harris,* 17 N.Y.2d 138, 269 N.Y.S.2d 119, 216 N.E.2d 326 (1966).

{¶19} The parties agree Appellants' requested variance was an area variance; therefore, the practical difficulties standard applies in this matter.

{¶20} 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. *Duncan*, supra at the syllabus.

{¶21} In applying the *Duncan* factors in subsequent cases, no specific factor should be deemed dispositive or automatically entitled to greater weight. *Salotto v. Wickliffe,* 193 Ohio App.3d 525, 2011–Ohio–1715, ¶ 19.

{¶22} Section 1147.03 of the Granville Code codifies the *Duncan* factors, and provides, in pertinent part:

> The following considerations shall be examined in the review and the public hearing of an application for variance:
>
> (a) That special circumstances or conditions exist which are peculiar to the land or structure(s) involved and which are not applicable to other lands or structures in the same zoning districts.
>
> * * *
>
> (c) That the special conditions and circumstances do not result from the actions of the applicant.

(d) That the granting of the variance will in no other manner adversely affect the health, safety and general welfare of the persons residing or working within the vicinity of the proposed variance, and not diminish or impair established property values within the surrounding areas, and not impair an adequate supply of light and air to adjacent properties, and not unreasonably increase the congestion in public streets.

{¶23} At the hearing before the Village Council, Appellants acknowledged the Barn was an accessory structure to the primary building. However, in their brief to this Court, they contend the Barn was an approved retail use when they applied for the parking variance. The record belies Appellants' assertion and clearly establishes the Barn was approved as an accessory use in 2009. In addition, if the Barn had been approved as a retail use in 2009, Appellants would have had to comply with the parking requirement of one off-street space for each 150 square feet of floor area at that time, which they did not do.

{¶24} We now address the question of whether, as a matter of law, a preponderance of reliable, probative, and substantial evidence exists to support the trial court's findings. *Henley v. Youngstown Bd. of Zoning Appeals,* 90 Ohio St.3d 142, 147 735 N.E.2d 433 (2000).

{¶25} In reviewing the decisions of the BZA and Village Council, the trial court analyzed the factors set forth in *Duncan*, supra. Throughout its judgment entry, the trial court clearly and thoughtfully discussed the evidence in the record and its application to those factors.

{¶26} The record reveals Appellants' inability to provide off-street parking to their patrons was not unique to their property. It was an issue facing the majority of businesses in the area. The variance requested was substantial as the demand for off-street parking in the area is high while the supply of spaces is low. Appellants' restaurant was the only business in the area to have late evening operating hours. There was concern about excessive noise during the evenings and outside alcohol consumption. Appellants purchased the property with full knowledge of the parking restrictions. Appellants had the option of constructing a ramp or installing a chair lift at the primary building, but instead chose to undergo the costly renovation of the Barn without approval relative to the parking. The Village Council found they were using the handicap access as a pretext to expanding the restaurant as Appellants had previously operated outside of their permitted occupancy. Diminished property values, noise, traffic congestion, as well as increased demand on law enforcement all weighed against granting the variance.

{¶27} We find competent and credible evidence supports the finding Appellants would not suffer practical difficulties if the variance was not granted. We, therefore, find the trial court did not abuse its discretion in finding substantial, reliable, and probative evidence to support the Village Council's denial of the variance.

{¶28} We now turn to Appellants' assertion the trial court erred in affirming the decision of the Village Council because they were denied equal protection of the laws as the Village Council "routinely and consistently approves parking variances for residents, businesses, a museum and religious organizations in or near" the Village Business District. Brief of Appellants at 12. Appellees acknowledge applications for parking variances are not uncommon, and are generally unopposed. However, as discussed,

supra, Appellants' property was not substantially similar to the properties they argued were comparable.

{¶29} Appellee explains, for each application, the Village Council weighs the variance criteria and balances such against the competing interests of the property owned requesting the variance and other residents. Appellants' application was considered in the same manner.

{¶30} "Equal protection of the law requires only that the laws be applied equally, not that the results be equal." *State ex rel: Norman v. Lucas Cty Welfare Dept.* (April 10, 1981), 6th Dist. Lucas No. C.A. L-80-176, 1981 WL 5546, citing *Personnel Administrator of Massachusetts v. Feeney*, 99 S. Ct. 2282 (1979); *Parham v. Hughes*, 99 S. Ct. 1742 (1979); *Dandridge v. Williams*, 397 U.S. 471 (1970). We find the trial court did not abuse its discretion in rejecting Appellants' equal protection argument.

{¶31} Appellants' second assignment of error is overruled.

{¶32} The judgment of the Licking County Court of Common Pleas is affirmed.

By: Hoffman, J.

Delaney, P.J. and

Baldwin, J. concur