

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Michael S. McDowell,	:	
Plaintiff-Appellant,	:	No. 08AP-1041
v.	:	(C.P.C. No. 07 CVH 11524)
City of Gahanna et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on December 22, 2009

McGrath & Foley, LLP, and *J. Edward Foley*, for appellant.

Wiles, Boyle, Burkholder & Bringardner Co., LPA, and *Brian M. Zets*, for appellees City of Gahanna and Don Shepherd.

Matan, Wright & Noble, and *Eugene L. Matan*, for appellee Christian Voice of Central Ohio.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal by plaintiff-appellant, William S. McDowell, from a judgment of the Franklin County Court of Common Pleas, granting summary judgment in favor of defendants-appellees, City of Gahanna ("Gahanna"), Donald R. Shepherd, and Christian Voice of Central Ohio ("CVCO").

{¶2} CVCO is a non-profit Ohio corporation. On March 27, 2007, CVCO submitted to the Gahanna Planning Commission ("planning commission") an application for a certificate of appropriateness, seeking to install two satellite dishes and a lattice tower on the north side of an existing parking lot on its property located at 881 East Johnstown Road, Gahanna. The subject property is zoned "Suburban Office and Institutional District." On April 12, 2007, the planning commission issued a "finding of fact" approving CVCO's certificate of appropriateness for building design. Gahanna subsequently issued two building permits and a certificate of use and occupancy for the property.

{¶3} On August 28, 2007, appellant, who owns property at 4096 Johnstown Road, located adjacent to CVCO's property, filed a complaint seeking a permanent injunction and a declaratory judgment. The complaint alleged that a radio broadcasting station is not listed as a permitted use under Section 1153.01 of the Gahanna City Code, and that the planning commission acted beyond the scope of its authority in approving the certificate of appropriateness for a non-permitted use. Appellant sought a declaration that the planning commission's zoning decision was arbitrary and unreasonable. Appellant also sought a permanent injunction enjoining Gahanna from carrying the planning commission's decision into effect, and the complaint additionally requested an award of damages.

{¶4} On September 17, 2007, appellant filed a motion for preliminary injunction. On October 19, 2007, Gahanna filed a memorandum contra appellant's motion for preliminary injunction. On November 2, 2007, CVCO filed a motion to dismiss, and a motion for summary judgment. The matter was referred to a magistrate of the trial court,

who issued a decision on December 3, 2007, recommending denial of appellant's motion for a preliminary injunction. Appellant filed objections to the magistrate's decision and, on March 12, 2008, the trial court filed a decision and entry overruling those objections.

{¶15} On August 7, 2008, Gahanna filed a motion for summary judgment. CVCO filed an amended motion for summary judgment on August 13, 2008. On September 25, 2008, the trial court filed a decision granting summary judgment in favor of Gahanna, Donald Shepherd, and CVCO (collectively "appellees"). The decision of the trial court was journalized by judgment entry filed on October 29, 2008.

{¶16} On appeal, appellant sets forth the following two assignments of error for this court's review:

1. The trial court erred, abused its discretion and committed reversible error when it failed to apply the plain wording of the Gahanna City Ordinances and granted summary judgment to Defendants City of Gahanna and Christian Voice of Central Ohio on the issue of whether the facility at 881 Johnstown Road is a radio broadcast station.
2. The trial court erred, abused its discretion and committed reversible error when it applied the Religious Land Use and Institutionalized Persons Act (hereinafter RLUIPA) in the absence of any evidence that enforcement of the Gahanna zoning ordinance would create a substantial burden on the religious mission of Christian Voice of Central Ohio.

{¶17} Under his first assignment of error, appellant argues that the trial court erred in granting summary judgment in favor of appellees because reasonable minds could differ on the issue whether the facility at 881 East Johnstown Road meets the definition of a radio broadcast station. Appellant contends that, by definition, CVCO's facility houses a radio broadcast station, or at least a component of one, and that a radio broadcast station is not a permitted use within Gahanna's Suburban Office and Institutional District.

Appellant also argues that the controlling factor is the use of the property, not the type of organization (i.e., charitable) using the property.

{¶8} Pursuant to Civ.R. 56(C), summary judgment is appropriate if: (1) there is no genuine issue of material fact remaining to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence in favor of the non-moving party, that conclusion is adverse to the non-moving party. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1994-Ohio-336. An appellate court reviews de novo a trial court's grant of summary judgment. *Id.*

{¶9} A party seeking a permanent injunction "must demonstrate by clear and convincing evidence that they are entitled to relief under applicable statutory law, that an injunction is necessary to prevent irreparable harm, and that no adequate remedy at law exists." *Acacia on the Green Condominium Assoc., Inc. v. Gottlieb*, 8th Dist. No. 92145, 2009-Ohio-4878, ¶18, citing *Proctor & Gamble Co. v. Stoneham* (2000), 140 Ohio App.3d 260, 268. A trial court's decision whether to grant or deny an injunction "is a matter solely within the discretion of the trial court and a reviewing court will not disturb the judgment of the trial court in the absence of a clear abuse of discretion." *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgt. Dist.*, 73 Ohio St.3d 590, 1995-Ohio-301, paragraph three of the syllabus.

{¶10} In the present case, appellant sought declaratory and injunctive relief pursuant to R.C. 713.13, which grants to contiguous or neighboring property owners the right to institute a suit to enjoin a violation of a zoning ordinance or regulation. R.C. 713.13 states as follows:

No person shall erect, construct, alter, repair, or maintain any building or structure or use any land in violation of any zoning ordinance or regulation enacted pursuant to sections 713.06 to 713.12, inclusive, of the Revised Code, or Section 3 of Article XVIII, Ohio Constitution. In the event of any such violation, or imminent threat thereof, the municipal corporation, or the owner of any contiguous or neighboring property who would be especially damaged by such violation, in addition to any other remedies provided by law, may institute a suit for injunction to prevent or terminate such violation.

{¶11} As noted under the facts, CVCO submitted an application for a certificate of appropriateness with the planning commission, seeking to install two satellite dishes and a lattice tower on the north side of its property at 881 Johnstown Road, Gahanna. Section 1197.05(a) of the Gahanna City Code provides: "A Certificate of Appropriateness must be obtained prior to commencing new construction or any remodeling, reconstruction or other building modification which would come within the jurisdiction" of the planning commission.

{¶12} Appellant, in asserting that CVCO seeks to use the subject property as a radio broadcast station, notes that Section 1153.01 of the Gahanna City Code, which addresses the city's "Suburban Office and Institutional District," does not list a radio broadcast station as a permitted use.¹

{¶13} Section 1153.01(a)(1) of the Gahanna City Code provides in part that permitted uses for a Suburban Office and Institutional District include an "[a]dministrative office primarily engaged in general administration, supervision, purchasing, accounting, and other management functions." Pursuant to Section 1153.01(a)(4) of the Gahanna

¹ Gahanna City Code Section 1153.05(a)(2) provides that radio and television broadcasting stations are a permitted use in a community service district.

City Code, "charitable organizations" also constitute a permitted use in a Suburban Office and Institutional District.

{¶14} Attached to Gahanna's motion for summary judgment was the transcript of the hearing before the magistrate regarding appellant's motion for a preliminary injunction. At that hearing, Bonnie Gard, Gahanna's planning and zoning administrator, testified that, in considering CVCO's application for a certificate of appropriateness, representatives of CVCO informed her that approximately 75 percent of the facility at 881 East Johnstown Road would be used for administrative purposes, and that approximately 25 percent would be used for computer equipment or studios. CVCO representatives also indicated the property would not be used as a radio broadcast station. Gard testified that, because "over 75 percent" of the facility is used for administrative offices, CVCO's use of the property complied with the city's zoning code. (Tr. 173.) With respect to the installation of the satellite dishes and tower/antenna, Gard testified that, based upon her interpretation of the city code, CVCO was not in violation of the city zoning laws regarding the use of the property at 881 East Johnstown Road.

{¶15} Daniel Baughman, the president and general manager of CVCO, testified that 80 percent of the building is used for administrative purposes, and that the property at 881 Johnstown Road is "not a broadcast station." (Tr. 264.) Baughman stated that the facility is not licensed by the Federal Communications Commission ("FCC"), nor does the FCC have any regulation over that facility. According to Baughman, there was never any intent to "broadcast from there or to ever move the broadcasting transmission facility to that location." (Tr. 264.) He testified that CVCO's broadcast facility is located at 4400

Reynoldsburg-New Albany Road, and that CVCO plans to build a new broadcast tower on Harlem Road, Westerville.

{¶16} Troy Bryant, the director of engineering for CVCO, similarly testified that 881 East Johnstown Road is not a broadcast station. Bryant stated that, "[b]y FCC definition, a broadcast station is the licensed frequency," and that CVCO is "currently licensed" by the FCC with respect to its facility located at 4400 Reynoldsburg-New Albany Road, which has a 368-foot tower, emitting 6,000 watts of power. (Tr. 93.) Bryant testified that CVCO never intended to make the location at 881 East Johnstown Road "a broadcast facility other than in-programming." (Tr. 96.) Bryant explained that the "SDL antenna" at 881 East Johnstown Road is "strictly the link to the 4400 Reynoldsburg-New Albany site with the signal coming from the studios." (Tr. 122.)

{¶17} As set forth above, Section 1153.01(a)(1) of the Gahanna City Code provides that a permitted use for a Suburban Office and Institutional District includes an "administrative office primarily engaged in general administration, supervision, purchasing, accounting, and other management functions." The word "primarily" has been defined to mean "essentially; mostly; chiefly; principally." Webster's Encyclopedic Unabridged Dictionary (Random House 1996). In terms of numbers, some courts have defined the word "primarily" to mean "a majority or a numerical plurality." *Baughman v. Dept. of Pub. Safety Motor Vehicle Salvage* (1997), 118 Ohio App.3d 564, 575, citing *In re Ragan* (Bankr.N.D.Ohio 1994), 171 B.R. 592, 595; *Deltide Fishing & Rental Tools, Inc. v. United States* (E.D.La.1968), 279 F.Supp. 661, 670.

{¶18} The evidence presented at the hearing regarding the proposed use of the facility indicates that substantially more than 50 percent of the facility at 881 East

Johnstown Road is utilized for administrative purposes. As noted above, there was testimony that between 75 to 80 percent of the facility is used for administrative purposes, and appellant presented no countervailing evidence on this issue.

{¶19} Appellant does not seriously challenge the evidence as to the administrative use of the facility but, rather, argues that the facility constitutes a radio broadcast station. In support, appellant argues that, pursuant to Gahanna City Code Section 1123.01(a), the planning commission should have defined the term "radio broadcast station" based upon "The Latest Illustrated Book of Development Definitions," by Harvey S. Moskowitz and Carl G Lindbloom. Section 1123.01(a) of the Gahanna City Code, however, references the above publication with respect to "words not particularly defined herein."

{¶20} During the hearing on the preliminary injunction, Gard testified that the Gahanna City Code is "based upon" the "Standard Industry Classification Manual." (Tr. 139.) Thus, with respect to "most" of the city code, "each use or use category" employs category numbers and definitions that correspond with the Standard Industry Classification ("SIC") manual. (Tr. 175.) Pursuant to SIC Group No. 483, a radio broadcasting station is defined to mean establishments "primarily engaged in broadcasting" aural programs by radio to the public. Gard testified that the SIC definition "as tied to those numbers makes it within this code of the city of Gahanna and that's what I would use." (Tr. 175.) According to Gard, the SIC definition "would be the first place I would look." (Tr. 176.)

{¶21} Section 1125.01 of the Gahanna City Code delegates to the planning commission the authority to "administer the provisions" of the zoning ordinance, and Section 1125.02 authorizes the planning commission to "make interpretations of" the

zoning ordinance. In general, when a zoning code authorizes an officer or board to interpret that code, such interpretation will be upheld if it is a reasonable interpretation. *Lockridge Outdoor Advertising v. Springfield Bd. of Zoning* (Oct. 15, 1999), 2d Dist. No. 99-CA-35. See also *Lawsons Co. v. City of Stow Council* (Mar. 4, 1987), 9th Dist. No. 12680 (city's council's power to implement purpose of zoning code necessarily includes the power to interpret the zoning regulations).

{¶22} In the present case, the evidence indicates that Gahanna's policy is to utilize SIC classifications/definitions within its zoning code, and the city's choice to incorporate the SIC manual as part of its code is not at issue before us. Further, the fact that appellant argues for the city to utilize a broader definition of "radio broadcast station" than that defined in the SIC manual does not create a genuine issue of material fact. Here, the evidence indicates that the city exercised its discretion in interpreting its own zoning ordinance, and there is no showing that the city's construction of the ordinance, based in part upon the SIC classifications and corresponding definitions, was arbitrary or unreasonable. As noted above, administrative offices are a permitted use in Gahanna's Suburban and Institutional District, and we find no genuine issues of material fact as to appellant's claim that CVCO's use of the property was in violation of "any zoning ordinance or regulation." R.C. 713.13.

{¶23} Accordingly, the trial court did not err in granting summary judgment in favor of appellees, nor did the court abuse its discretion in denying appellant's motion for injunctive relief. Appellant's first assignment of error is overruled.

{¶24} In light of our disposition of the first assignment of error, we need not address the issue whether the trial court erred in finding that injunctive relief against

CVCO would impose a substantial burden on the exercise of religion in violation of the Religious Land Use and Institutionalized Persons Act. Appellant's second assignment of error is therefore rendered moot.

{¶25} Based upon the foregoing, appellant's first assignment of error is overruled, the second assignment of error is rendered moot, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

KLATT and McGRATH, JJ., concur.
