[Cite as *JP Morgan Chase Bank, Inc. v. Dublin*, 2011-Ohio-3823.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

JP Morgan Chase Bank, Inc.,	:	
Appellant-Appellant,	:	
v.	:	No. 10AP-965 (C.P.C. No. 09CVF-03-3735)
City of Dublin, Ohio et al.,	:	(REGULAR CALENDAR)
Appellees-Appellees.	:	

D E C I S I O N

Rendered on August 4, 2011

Smith & Hale LLC, *Ben W. Hale*, *Jr.*, and *Aaron L. Underhill*, for appellant.

Schottenstein Zox & Dunn Co., *LPA*, *Stephen J. Smith*, and *Asim Z. Haque*, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Appellant, JP Morgan Chase Bank, Inc. ("Chase"), appeals the judgment of the Franklin County Court of Common Pleas, which affirmed the decision of appellees, the city of Dublin, Ohio, and the city of Dublin, Ohio, Board of Zoning

Appeals ("BZA") (collectively, the "City"), denying Chase's application for a wall-sign permit. For the following reasons, we affirm.

{¶2} Chase operates a retail bank branch within space it leases inside a Kroger grocery store, located at 7100 Hospital Drive in Dublin, Ohio. Chase leases its space from Kroger, which is the largest tenant of the Avery Road retail center.[1] The space leased to Chase includes a portion of the exterior door and entry vestibule, which provide access to the Kroger store, but bank customers must enter the Kroger store to access the bank. Specifically, bank customers must enter the entry vestibule, where Kroger stores its shopping carts, and then proceed through another set of doors, into the Kroger store, to reach the bank, which is located in the front portion of the grocery and is oriented toward the interior of the store.

{¶3} The Avery Road retail center is located within a site zoned as a Planned Commerce District ("PCD"), and the zoning and development standards applicable to it are established by a zoning standards text (the "Riverside PCD text"). The Kroger store, and the Chase branch inside it, are located within Subarea B of the PCD. As relevant to this appeal, the Riverside PCD text states that, in Subarea B, "[e]ach tenant store front shall be limited to one wall sign, one projecting sign and one awning sign." The Kroger store was identified by a permanent wall sign on the exterior of the building, over the entry vestibule.

{¶4} On November 4, 2008, Chase filed an application with the City, requesting a permit to install a permanent exterior wall sign to identify the bank branch. The City's Department of Land Use and Long Range Planning (the "planning department")

disapproved Chase's application on November 19, 2008, as "NOT ALLOWED BY TEXT OR SIGN CODE." Email correspondence from Dave Marshall, a City Development Review Specialist, states that neither the Riverside PCD text nor the City's sign code "allow[s] for a second wall sign to be installed for a subtenant of an in-line tenant retail space that is already occupied and identified by the anchor tenant."

{¶5} Chase appealed the denial of its application to the BZA, which held a hearing on January 22, 2009. At the hearing, the BZA heard arguments on behalf of the planning department and Chase, and board members asked questions of both parties. The planning department explained that it denied Chase's application based on the Riverside PCD text and its determination that Chase did not have a "tenant store front." The BZA voted, 4 to 1, to uphold the planning department's decision to deny Chase's application, and it subsequently issued an order to that effect.

{¶6} Chase then appealed to the Franklin County Court of Common Pleas pursuant to R.C. Chapter 2506. The trial court determined that the City's interpretation of the Riverside PCD text was reasonable and that the BZA's decision was not unconstitutional, illegal, arbitrary, capricious, unreasonable or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Accordingly, on September 13, 2010, the trial court affirmed the BZA's order.

{¶7} Chase filed a timely appeal to this court and now asserts the following assignments of error:

> I. THE TRIAL COURT ERRED WHEN IT FAILED TO FIND THAT [THE CITY] ILLEGALLY & ARBITRARILY

[1] An illustration in the record alternatively identifies the shopping center as "Avery Square."

> DETERMIN[ED] THAT [CHASE] IS NOT A "TENANT" OF THE LEASED SPACE IN WHICH IT [OPERATES].
>
> II. THE TRIAL COURT ERRED WHEN IT FAILED TO FIND THAT [THE CITY] ILLEGALLY AND ARBITRARILY DETERMINED THAT [CHASE'S] LEASED SPACE DOES NOT HAVE A "STORE FRONT".
>
> III. [THE CITY'S] CONSIDERATION AND REPEATED EMPHASIS OF THE CONSEQUENCES OF GRANTING [CHASE'S] SIGN PERMIT WAS ILLEGAL AND SHOULD HAVE BEEN RECOGNIZED BY THE COMMON PLEAS COURT AS REVERSIBLE ERROR.

{¶8} A trial court's scope of review in an R.C. Chapter 2506 administrative appeal is set forth in R.C. 2506.04, which states, in pertinent part, as follows:

> If an appeal is taken in relation to a final order, adjudication, or decision covered by division (A) of section 2506.01 of the Revised Code, the court may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. * * *

This court has characterized the R.C. 2506.04 standard as a hybrid form of review due to the balance the reviewing court must maintain. *Athenry Shoppers Ltd. v. Dublin Planning & Zoning Comm.*, 10th Dist. No. 08AP-742, 2009-Ohio-2230, ¶17. The court of common pleas "must weigh the evidence to determine whether the administrative decision is supported by the preponderance of substantial, reliable, and probative evidence, but still give due deference to the administrative agency's resolution of evidentiary conflicts and not blatantly substitute its judgment for that of the agency, especially in areas of administrative expertise." Id., citing *Elbert v. Bexley Planning Comm.* (1995), 108 Ohio App.3d 59, 66. A court of common pleas may not substitute its judgment for that of an administrative board unless it finds that there is not a

preponderance of reliable, probative, and substantial evidence to support the board's decision. *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34.

{¶9} R.C. 2506.04 authorizes an appeal from a judgment of the court of common pleas only "on questions of law as provided in the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code." An appeal to the court of appeals "is more limited in scope and requires that court to affirm the common pleas court, unless the court of appeals finds, as a matter of law, that the decision of the court of common pleas is not supported by a preponderance of reliable, probative and substantial evidence." *Kisil* at 34. The court of appeals does not possess "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. Essentially, with respect to the weight of the evidence, the appellate court determines only whether the court of common pleas abused its discretion. *Banks v. Upper Arlington*, 10th Dist. No. 03AP-656, 2004-Ohio-3307, ¶15, citing *Cross Country Inns, Inc. v. Westerville*, 10th Dist. No. 02AP-410, 2003-Ohio-3297, ¶23; see also *Kisil* at 35 (concluding that the trial court did not abuse its discretion in reversing an administrative decision).

{¶10} This appeal stems primarily from the City's interpretation of the Riverside PCD text, the zoning text applicable to the Avery Road retail center. Because zoning regulations are in derogation of property rights, "they should be given a fair and reasonable construction with due regard for the conflicting interests involved." *4522 Kenny Rd., L.L.C. v. Columbus Bd. of Zoning Adjustment*, 152 Ohio App.3d 526, 2003-Ohio-1891, ¶12, citing *State ex rel. Scadden v. Willhite*, 10th Dist. No. 01AP-800, 2002-

Ohio-1352. "A court should give the words in a zoning regulation the meaning commonly attributed to them unless a contrary intention appears in the regulation." *4522 Kenny Rd., L.L.C.* at ¶12. The meaning of relevant provisions, however, must be derived from the context of the entire ordinance. Id. When an ordinance is ambiguous, courts will construe restrictions on the use of property in favor of the property owner, but, when an ordinance is unambiguous, the court simply reads and follows the words of the ordinance. Id. at ¶12-13. Here, neither party argues that the Riverside PCD text is ambiguous.

{¶11} Interpretation of a zoning ordinance raises a question of law within the court of appeals' limited review in an R.C. 2506.04 appeal. *Ware v. Fairfax Bd. of Zoning Appeals*, 164 Ohio App.3d 772, 2005-Ohio-6516, ¶5. "An administrative agency's reasonable interpretation of local zoning codes is recognized as an area of administrative expertise and is to be presumed valid." *Glass City Academy, Inc. v. Toledo*, 179 Ohio App.3d 796, 2008-Ohio-6391, ¶18, citing *Lamar Outdoor Advertising, Inc. v. Dayton Bd. of Zoning Appeals*, 2d Dist. No. 20158, 2004-Ohio-4796, ¶6, and *Dick v. Kelleys Island Bd. of Zoning* (June 19, 1987), 6th Dist. No. E-86-63; see also *Elbert* at 69 (finding a BZA's interpretation of a zoning ordinance "reasonable and entitled to weight"). Other courts, however, have framed the court of appeals' review of the interpretation of a city ordinance as de novo, even in the context of R.C. 2506.04 appeals. See *Moulagiannis v. Cleveland Bd. of Zoning Appeals*, 8th Dist. No. 84922, 2005-Ohio-2180, ¶10, citing *Lamar*; *Ware* at ¶5; *Taylor v. Circleville*, 4th Dist. No. 03CA8, 2003-Ohio-7166, ¶11. Regardless of which standard we apply, we reach the

same conclusion—that neither the BZA nor the trial court erred in interpreting or applying the Riverside PCD text.

{¶12} Because they are related, we address Chase's first and second assignments of error together. By its first assignment of error, Chase argues that the trial court erred by failing to find that the City illegally and arbitrarily determined that Chase was not a "tenant." By its second assignment of error, Chase argues that the trial court erred by failing to find that the City illegally and arbitrarily determined that Chase does not have a "store front." Both assignments stem from the City's interpretation of the Riverside PCD text's statement that "[e]ach *tenant store front* shall be limited to one wall sign." (Emphasis added.) The trial court concluded that the City's interpretation of those terms was reasonable and that the BZA's decision to deny Chase's application was not unconstitutional, illegal, arbitrary, capricious, unreasonable or unsupported by a preponderance of reliable, probative, and substantial evidence.

{¶13} The applicable portion of the Riverside PCD text limits each "tenant store front" to a single wall sign. As used in the Riverside PCD text, "tenant" modifies "store front," and the terms must be read in concert. Nevertheless, Chase argues that the City illegally and arbitrarily construed each of these terms to exclude Chase. Specifically, Chase maintains that the City erroneously read into the term "tenant," a distinction between a prime tenant and a subtenant, and that the City erroneously read into the term "store front," an exterior door requirement.

{¶14} Because neither "tenant" nor "store front" is defined in the Riverside PCD text, Chase urges that the common, dictionary definitions of those terms must apply. "Tenant" is commonly defined as follows: "1. a person or group that rents and occupies

land, a house, an office, or the like, from another for a period of time; lessee. 2. *Law*. a person who holds or possesses for a time lands, tenements, or personalty of another, usually for rent." The Random House Dictionary of the English Language (2 Ed. Unabridged 1987). "Storefront" is commonly defined as follows: "1. the side of a store facing a street, usually containing display windows. 2. a store or other establishment that has frontage on a street or thoroughfare * * *. 3. of or pertaining to the frontage of a store, esp. the display windows." The Random House Dictionary of the English Language (2 Ed. Unabridged 1987). Chase maintains that it satisfies both of those definitions and is, therefore, entitled to a wall-sign permit.

{¶15} Chase argues that it meets the common definition of "tenant" because it is an occupant of space leased from another for a period of time, and that the planning department admitted Chase is a tenant in its report to the BZA, where the planning department stated, although "Chase * * * may be generally considered a 'tenant,' the bank is more appropriately classified as a 'sub-tenant' of the anchor tenant (Kroger)." Chase maintains that the City's differentiation of a "subtenant" from a "tenant" was improper because the term "subtenant" does not appear in the Riverside PCD text.

{¶16} Neither Chase's status as an occupant of space leased from another nor the planning department's statement that Chase "may be generally considered a 'tenant' " establishes that Chase is a "tenant" under the specific terms of the Riverside PCD text. The word "tenant" must be read in the context of the entire Riverside PCD text. See *4522 Kenny Rd., L.L.C.* at ¶12. Absent consideration of this context and taken to its logical extreme, Chase's argument would nonsensically suggest that any occupant of leased space would qualify as a "tenant" under the Riverside PCD text,

without regard to even whether the leased space is located within the PCD. Reading the term "tenant" in the context of the Riverside PCD text limits the pool of potential "tenants," even while otherwise applying the common definition of that term. The Riverside PCD text identifies Kroger as "the major tenant" in Subarea B. Because a tenancy stems from a lessee's relationship with a lessor, it is reasonable to read the word "tenant," in the Riverside PCD text, as referring to those entities, like Kroger, that lease space from the owner or developer of the retail center, as opposed to subtenants, who depend upon the tenant from whom they lease. Chase has no contractual relationship with the owner or developer of the retail center; instead, Chase's rights arise solely from its contractual relationship with Kroger. Accordingly, the planning department concluded, and argued to the BZA, that Chase is more appropriately classified as a subtenant. We agree with the trial court that the City's distinction between Kroger, as a "tenant," and Chase, as a "subtenant," is reasonable.

{¶17} Contrary to Chase's argument, the absence of the word "subtenant" in the Riverside PCD text does not mandate that the term "tenant" encompasses subtenants for zoning purposes or that the City's distinction between the two was unreasonable, arbitrary or illegal. Nothing in the Riverside PCD text suggests that a "tenant store front," like Kroger, is entitled to create additional "tenant store fronts" by simply subleasing portions of its space. Indeed, the trial court recognized that the City, in approving the Riverside PCD text, intended to limit the number of signs permitted in the retail center. Although Chase asserts that the City subjectively created the term "subtenant," the trial court aptly noted that the concept of subtenants is recognized in Ohio law and that Ohio courts routinely distinguish between the status of tenants and

subtenants. See, e.g., *MCM Funding 1997-1, Inc. v. Amware Distrib. Warehouses M&M, L.L.C.*, 8th Dist. No. 87041, 2006-Ohio-3326, ¶17-18. The City has not extended the Riverside PCD text to encompass limitations not clearly prescribed by distinguishing between a tenant and a subtenant, a distinction recognized in Ohio law.

{¶18} Chase also argues that the City arbitrarily and illegally interpreted the term "store front" to justify the denial of Chase's permit application. Based on the common definition of that term, Chase argues that it has a "store front" because its leased space includes an exterior wall with windows, facing the driveway in front of the Avery Road retail center, whereas the planning department argued that Chase's dependence on Kroger, especially in light of the absence of independent access to the bank branch, disqualified it from being considered a "store front." In its examination of the record and weighing of the evidence, the trial court stressed that Chase does not have independent means of ingress and egress, that the exterior wall Chase claims as its "store front" is not a part of Chase's leased premises, and that the Chase branch is oriented toward the inside of the Kroger store. After weighing the evidence in the record, the trial court concluded that "[t]he lack of an exterior door [and] the lack of ownership or rental rights in the physical exterior of the building were reasonable facts to form [the City's] ultimate conclusion that [Chase] did not have a 'store front.' "

{¶19} Chase argues that the Kroger store is open 24 hours, seven days a week, and that Kroger's hours provide Chase constant access to the leased premises. Nevertheless, Kroger's current hours do not diminish Chase's reliance on Kroger for its occupancy, especially given its lack of independent access. Moreover, as noted by the trial court, the evidence demonstrated that the exterior wall remains part of Kroger's

leasehold and was not included in the premises sublet to Chase. Finally, the orientation of the bank branch toward the interior of the Kroger store, and away from the front of the building, could be considered in determining whether Chase had a "tenant store front." Two of the common definitions of "store front" refer to "frontage," which is commonly defined as "the direction [something] faces" or "the front of a building or lot." The Random House Dictionary of the English Language (2 Ed. Unabridged 1987). Because the front of the bank branch faces into the Kroger store, it was reasonable to conclude that Chase did not have a "store front." For these reasons, we cannot conclude that the trial court erred, as a matter of law, by determining that the BZA's order regarding Chase's lack of a "store front" was supported by a preponderance of reliable, probative, and substantial evidence.

{¶20} The architectural drawings attached to the Riverside PCD text further underscore the reasonableness of the BZA's determination that Chase did not qualify as a "tenant store front" and was not entitled to a wall sign. One drawing illustrates an overview of Subarea B and delineates the space leased to Kroger, which includes the space subsequently sublet to Chase. Under the Riverside PCD text, Kroger and three other anchor tenants, in identified locations, were permitted signs with heights exceeding the 15-foot limit applicable to remaining "tenant store fronts" in Subarea B. Additional drawings illustrate the placement and height limits of those signs, including the Kroger sign. The delineation of the Kroger store on the drawings, coupled with the illustration of the Kroger sign, and the reference to Kroger as "the major tenant," reasonably establishes the Kroger space as a single "tenant store front." Thus, the "tenant store front" at issue here is the Kroger store, as identified on the architectural

drawings. Although Chase operates out of that same "tenant store front," as a result of its sublease with Kroger, the City reasonably interpreted the Riverside PCD text to determine that no additional wall sign is permitted. The determination that Chase does not have a "tenant store front" is consistent with the unambiguous language of the Riverside PCD text, read in the context of the entire text, including the attached architectural drawings. The BZA did not act illegally or arbitrarily in determining that Chase was not entitled to a wall sign because it did not have a "tenant store front," and the trial court did not err in concluding that a preponderance of reliable, probative, and substantial evidence supported the BZA's order. For these reasons, we overrule Chase's first and second assignments of error.

{¶21} Chase's final assignment of error states that the trial court erred by not reversing the BZA's order as a result of the City's emphasis on alleged policy consequences of granting Chase's application for a sign permit. Specifically, Chase takes issue with the planning department's expressed concern that granting Chase's application would lead to a proliferation of unwanted signs by similarly-situated entities in this and other shopping centers in the City. Chase contends that, by emphasizing these policy issues, the planning department ignored a Dublin City Code section stating that the BZA's obligation was to determine whether the planning department's decision was based upon the proper requirements and standards of the Code. Rather, Chase suggests that the BZA improperly spun its interpretation of the Riverside PCD text in order to achieve a policy goal.

{¶22} The trial court rejected Chase's argument as moot after determining that the BZA reasonably interpreted the Riverside PCD text to conclude that the planning

department properly denied Chase's application based on the zoning standards established by the Riverside PCD text. Upon review of the complete record, the trial court also noted that the BZA was properly instructed that its review was limited to determining whether the City made an improper determination. While Chase argues that the instruction cited by the trial court does not overcome the policy arguments presented to the BZA, we discern no abuse of discretion by the trial court in this regard. See *Banks* at ¶34 (rejecting an argument that a zoning appeals board based its decision on improper grounds where the decision was in accordance with the plain meaning of the appropriate ordinance). Accordingly, we overrule Chase's third assignment of error.

{¶23} Having overruled each of Chase's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN, J., concurs.
TYACK, J., dissents.

TYACK, J., dissenting.

{¶24} If Chase is not a tenant, then the text of Subarea A of the Planned Commerce District ("PCD") does not apply to it and the limitation contained in that text is not a limit on Chase. Assuming that Kroger is a tenant, as opposed to a subtenant, then the limitation applies to Kroger only. The text neither grants Chase nor anyone else the right to have a sign. The code section is a limitation only.

{¶25} Since the PCD text grants no one the right to a sign and works to limit the number of signs for tenants only, the text cannot block a sign for Chase. The balance of

the Dublin Codes, especially other portions applicable to signage, is not before us and was not before the court of common pleas, so we do not know what rights it grants and what prohibition it contains.

{¶26} If Dublin chooses to interpret the PCD text in a way such that subtenants have no rights under the PCD text, then Dublin must acknowledge that the limitations related to the PCD text also do not apply.

{¶27} Similarly, if Chase has no rights because you have to walk into Kroger to enter the bank, then the limitations of the PCD text do not apply. In theory, Chase could hang a dozen illuminated signs in its exterior window and nothing in the PCD text could affect that.

{¶28} As a business matter, Dublin's interpretation of the PCD text discourages business growth. An entity which would consider becoming a major tenant in Dublin would have to think twice about becoming a tenant if subtenants cannot let the outside world know they are there. Subtenants might find that retail space is less desirable if they cannot advertise to potential street traffic or walk-in traffic. Subtenants then might decide not to become subtenants.

{¶29} In summary, the PCD text used as a bar to Chase putting up an exterior sign cannot apply to subtenants. The case should be returned to the city of Dublin and its Board of Zoning Appeals to determine if there is some other provision of the Dublin City Code which either grants or blocks an exterior sign for Chase.