[Cite as *Kreinest v. Planning Comm. of Maineville*, 2015-Ohio-1178.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

JIM KREINEST,	:	
Plaintiff-Appellant,	:	CASE NO. CA2014-06-087
	:	O P I N I O N
- vs -		3/30/2015
	:	
THE PLANNING COMMISSION OF THE VILLAGE OF MAINEVILLE,	:	
	:	
Defendant-Appellee.	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 12CV81607

Manley Burke LPA, Timothy M. Burke, James M. Cooney, 225 West Court Street, Cincinnati, Ohio 45202-1053, for plaintiff-appellant

Schroeder, Maundrell, Barbiere & Powers, Lawrence E. Barbiere, 5300 Socialville Foster Road, Suite 200, Mason, Ohio 45040, for defendant-appellee

HENDRICKSON, J.

{¶ 1} Plaintiff-appellant, Jim Kreinest, appeals the decision of the Warren County Court of Common Pleas affirming the decision of defendant-appellee, the Planning Commission of the village of Maineville, to deny Kreinest's request to maintain a gravel parking lot on his property.

{¶ 2} In June 2009, Kreinest purchased real property located at 8088 S. State Route 48 in Maineville, Ohio, with the intention of converting the single-family residence on the property into a seasonal, walk-up ice cream stand ("KolorKones"). Soon thereafter, Kreinest discussed his site plan with the village administrator and modified the plan based upon the Administrator's suggestions, including adding "Blacktop Parking" to his drawings. Then, in accordance with the Maineville Zoning Ordinance ("M.Z.O."), Kreinest submitted his site plan for review by the Planning Commission.[1] The Planning Commission considered Kreinest's plan at its August 2009 meeting, and approved the plan with several conditions.

{¶ 3} By the Planning Commission's meeting in August 2010, Kreinest had completed substantial renovation work on the property and sought permission to open KolorKones. The Planning Commission granted Kreinest a temporary permit through April 1, 2011, but imposed several further conditions, including requirements that plans for completing the parking lot be submitted within 60 days, and that the current gravel parking lot be maintained in a dust-free manner until it could be paved. Kreinest operated KolorKones under the temporary permit from August 28, 2010 until he closed for the season on October 31, 2010.

{¶ 4} In November 2010, the village notified Kreinest that his failure to pave the KolorKones parking lot was a violation of M.Z.O. 20.07. His temporary permit was not extended, and KolorKones did not open for the season in the spring of 2011.

{¶ 5} In July 2011, the Planning Commission allowed KolorKones to open under another temporary permit. The 2011 temporary permit, like the permit issued the previous year, imposed several conditions. Among other things, Kreinest was required to begin paving the parking lot no later than August 2, 2011, and to complete the paving no later than August 19, 2011. The minutes of the Planning Commission meeting on August 2, 2011, suggest that

1. The parties agree that the applicable version of the M.Z.O. is the ordinance as revised in October 2009.

preparations for paving the KolorKones parking lot began that day. Nevertheless, rather than comply with the remaining conditions of the temporary permit, Kreinest closed KolorKones for the season on August 19, 2011.

{¶ 6} In November 2011, Kreinest was again notified that he was in violation of M.Z.O. 20.07. Soon thereafter, he retained counsel and submitted a formal request to the Planning Commission for approval to maintain a gravel parking lot as permitted by M.Z.O. 20.07(B). At a special meeting of the Planning Commission on December 6, 2011, a vote was taken to deny Kreinest's request.

{¶ 7} However, because Kreinest and his counsel were not present at the December 6 meeting, his request was reconsidered at the Planning Commission's January 3, 2012, meeting. At this time, Kreinest and his counsel presented the case for a gravel parking lot. After extensive discussion by the Planning Commission, the matter was tabled until the next meeting. In the interim, the Planning Commission sought an advisory memorandum from Maineville's city planner, Anne McBride.

{¶ 8} The Planning Commission met again on January 24, 2012. At the meeting, McBride presented her memorandum and recommended against approval of the gravel parking lot. That same evening, the Planning Commission voted a second time to deny Kreinest's request. Neither the minutes of the January 24 meeting, nor the letter from the Planning Commission notifying Kreinest of its decision, included findings of fact or an explanation of the Planning Commission's decision.

{¶ 9} Pursuant to R.C. Chapter 2506, Kreinest filed an administrative appeal of the Planning Commission's decision in the Warren County Court of Common Pleas. On appeal, Kreinest noted that the Planning Commission submitted minutes of its meetings rather than transcripts, and that it failed to file any findings of fact. Thus, he requested an evidentiary hearing under R.C. 2506.03 on the ground that the record was deficient. With respect to the

merits of the Planning Commission's decision, Kreinest argued that M.Z.O. 20.07 was "facially unconstitutional and void," and that the decision was unsupported by a preponderance of substantial, reliable, and probative evidence.

{¶ 10} The magistrate agreed that the record was deficient, and an evidentiary hearing was held in April 2013. The parties' subsequent attempt at mediation failed, and the magistrate issued a decision in favor of the Planning Commission on February 24, 2014. Kreinest timely objected, but on May 23, 2014, the common pleas court overruled his objections and affirmed the decision of the Planning Commission.

{¶ 11} In its decision, the common pleas court observed that the record "contains a report from an expert and testimony from the same expert that the parking lot in question is not a smooth, durable and hard surface." The court also stated that "[t]he [P]lanning [C]ommission's denial of the request is supported by the report of the expert, the failure of the appellant to produce any evidence in support of his request and the overall intent of the Village to create a downtown community center." For these reasons, the court held that the denial of Kreinest's request was not arbitrary, unreasonable, or capricious, and that it was supported by substantial, reliable, and probative evidence.

{¶ 12} With respect to Kreinest's constitutional argument, the common pleas court did not consider his facial challenge to the M.Z.O., but rather focused its analysis upon the Planning Commission's denial of Kreinest's specific proposed use. In so doing, the court found that the prevention of parking surfaces that collect water and are not durable was a legitimate exercise of Maineville's police powers, as was the preservation of the "aesthetics of the community." Therefore, the court concluded that the Planning Commission's denial of Kreinest's request to maintain a gravel parking lot was not unconstitutional.

{¶ 13} Kreinest now appeals from the decision of the common pleas court, raising one assignment of error.

{¶ 14} Assignment of Error No. 1:

{¶ 15} THE COMMON PLEAS COURT ERRED IN UPHOLDING THE DECISION OF THE MAINEVILLE PLANNING COMMISSION, WHICH DENIED APPELLANT JIM KREINEST'S REQUEST FOR AN ALTERNATIVE PARKING SURFACE ON HIS PROPERTY.

{¶ 16} Under his single assignment of error, Kreinest raises two arguments for review: (1) the common pleas court misinterpreted his challenge to the constitutionality of the zoning ordinance and, as a result, conducted the wrong analysis to reach its decision on that issue, and (2) the common pleas court erred by basing its decision on criteria not contained within the applicable zoning ordinance.

Standard of Review for an Administrative Appeal

{¶ 17} R.C. Chapter 2506 governs the appellate process for review of decisions by administrative agencies in quasi-judicial proceedings. *Mills v. Union Twp. Bd. of Zoning Appeals,* 12th Dist. Clermont No. CA2005-02-013, 2005-Ohio-6273, ¶ 6. Upon appeal of an agency's decision, R.C. 2506.04 requires the common pleas court to review the entire record, including any new or additional evidence admitted under R.C. 2506.03, and determine whether the decision was "unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence * * *." The decision of the agency is presumed to be valid, and the burden of showing its invalidity rests upon the contesting party. *Consol. Mgt., Inc. v. Cleveland*, 6 Ohio St.3d 238, 240 (1983); *Solid Rock Ministries Internatl. v. Bd. of Zoning Appeals of Monroe*, 138 Ohio App.3d 46, 50 (12th Dist.2000)

{¶ 18} An appellate court's review is more limited in scope. *Kisil v. Sandusky*, 12 Ohio St.3d 30, 34 (1984). Whereas it is incumbent upon the common pleas court in an R.C. Chapter 2506 appeal to examine and weigh evidence, the appellate court must affirm the

common pleas court's decision unless it finds, as a matter of law, that the lower court's decision was not supported by a preponderance of substantial, reliable, and probative evidence. *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147 (2000); *Hutchinson v. Wayne Twp. Bd. of Zoning Appeals*, 12th Dist. Butler No. CA2012-02-032, 2012-Ohio-4103, ¶ 15. An abuse of discretion by the common pleas court in weighing the evidence is "[w]ithin the ambit of one of 'questions of law' for appellate court review" in an administrative appeal. *Kisil* at 34, fn. 4.

Constitutional Challenge to the Zoning Ordinance

{¶ 19} Kreinest claims it was error for the common pleas court to disregard his facial challenge to the constitutionality of the M.Z.O. and focus its analysis upon the Planning Commission's denial of his specific proposed use. He contends that had the court considered whether the M.Z.O. was unconstitutional on its face, the court would have found the standards to be so vague as to inevitably lead the Planning Commission to arbitrary or capricious decisions, such as the denial of his request.

{¶ 20} The Ohio Supreme Court has recognized two distinct processes for challenging the constitutionality of a zoning ordinance: (1) an appeal from an administrative decision pursuant to R.C. Chapter 2506, and (2) a declaratory judgment action pursuant to R.C. Chapter 2721. *Karches v. Cincinnati*, 38 Ohio St.3d 12, 15-16 (1988); *Kaelorr v. W. Chester Twp. Bd. of Zoning Appeals*, 12th Dist. Butler No. CA2012-03-058, 2012-Ohio-4875, ¶ 24-25.

{¶ 21} A property owner may take an appeal under R.C. Chapter 2506 from an adverse final decision of an administrative agency, in a quasi-judicial proceeding, denying the owner permission to make a specific use of his land. *Napier v. Middletown*, 12th Dist. Butler No. CA98-06-128, 1998 WL 857491, *3; *Flair Corp. v. Brecksville*, 49 Ohio App.2d 77, 80 (8th Dist.1976). The review by the common pleas court in such an appeal is limited, and the court must view any constitutional arguments by the property owner only in light of the

property owner's specific proposed use. *Karches* at 16. Thus, a facial attack on the constitutionality of a zoning ordinance is beyond the scope of an R.C. Chapter 2506 appeal. *Napier* at *4, citing *Grossman v. Cleveland Hts.*, 120 Ohio App.3d 435 (8th Dist.1997).

{¶ 22} In determining whether the prohibition of the specific proposed use is constitutional, the reviewing court must inquire whether the prohibition has a reasonable relationship to the legitimate exercise of the municipality's police powers. *Karches* at 16. *See also Goldberg Cos., Inc. v. Richmond Hts. City Council*, 81 Ohio St.3d 207, 214 (1998), citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114 (1926). If the reviewing court finds such a relationship, then the prohibition is valid and the court's inquiry ends. *Karches* at 16.

{¶ 23} A declaratory judgment action pursuant to R.C. Chapter 2721, on the other hand, "may be brought to determine *any question* of construction or validity arising under" the ordinance. (Emphasis added.) R.C. 2721.03. *See also Driscoll v. Austintown Associates,* 42 Ohio St.2d 263, 271 (1975). A declaratory judgment action "is independent from the administrative proceedings and it is not a review of a final administrative order." *Karches*, 38 Ohio St.3d at 16. Rather, the central question in a declaratory judgment action is the objective constitutionality of a zoning ordinance as applied to a particular parcel of property. *Id.*

{¶ 24} In the present case, Kreinest proposed to maintain a gravel parking lot for KolorKones, but the Planning Commission denied his request. Thus, the issue for the common pleas court to determine under Krienest's R.C. Chapter 2506 appeal was whether or not the denial of Kreinest's request had any reasonable relationship to the legitimate exercise of Maineville's police powers.

{¶ 25} In claiming unconstitutionality, Kreinest did not argue that the denial of his request was not a valid use of Maineville's police powers. Rather, he argued that the

ordinance is "facially unconstitutional" because the language is so vague as to constitute an unlimited delegation of legislative authority to the Planning Commission.[2] This facial attack on the constitutionality of the ordinance is not within the scope of an R.C. Chapter 2506 appeal. *Napier*, 1998 WL 857491 at *4. Had Kreinest brought a declaratory judgment action, he could have challenged the constitutionality of the ordinance either on its face, or as applied to his property by the Planning Commission's decision. *Id.* at *5. In Kreinest's R.C. Chapter 2506 administrative appeal, however, the common pleas court could only consider whether the prohibition of his specific proposed use was valid.

{¶ 26} Therefore, we disagree with Kreinest's contention that it was error for the common pleas court to disregard his facial challenge to the constitutionality of the M.Z.O. and focus its analysis upon the Planning Commission's denial of his specific proposed use. The court properly limited its inquiry to whether the Planning Commission's denial of Kreinest's request to maintain a gravel parking lot was reasonably related to a legitimate exercise of Maineville's police powers.

Criteria Within the Zoning Ordinance

{¶ 27} Kreinest also argues that the Planning Commission's denial of his request to maintain a gravel parking lot, as well as the common pleas court's decision affirming the Planning Commission, were invalid, arbitrary decisions. He points out that the zoning provision applicable to his request was M.Z.O. 20.07(B), and asserts that under this provision, the only criteria upon which the Planning Commission and the common pleas court could properly base their respective decisions were whether the materials used for the

2. In support of his argument, Kreinest cited the Ohio Supreme Court's decision in *Consol. Mgt., Inc.*, 6 Ohio St.3d at 241-242. However, the present case is distinguishable. In *Consol. Mgt.*, the Supreme Court reversed the approval of a variance where there was no affirmative evidence in the record, and where the approval was based only upon a very general provision in the zoning ordinance. *Id.* at 241. In the present case, the common pleas court held an evidentiary hearing under R.C. 2506.03 to remedy perceived deficiencies in the record, and based its decision upon evidence admitted at that hearing. Moreover, as will be discussed below, the common pleas court's decision was based upon specific criteria promulgated within the M.Z.O.

parking surface would provide "a durable, smooth, and dustless surface." Yet, he claims the Planning Commission and the court based their decisions "on a variety of factors not contained within the Ordinance," such as "the overall intent of the Village to create a downtown community center," and the inconsistency of a gravel lot with surrounding businesses.

{¶ 28} M.Z.O. 20.07 provides that

> Off-street parking facilities shall be paved in accordance with the construction and design standards established by the Village and the following:
>
> A. Paved surface: Parking facilities shall be paved with concrete, plant mixed bituminous asphalt or similar materials. All parking spaces in paved lots shall be marked with pavement striping.
>
> B. Gravel surface: The Planning Commission shall have the discretion to allow parking areas to be surfaced with graded earth, treated stone, or gravel materials that provide a durable, smooth, and dustless surface.

Thus, the plain language of the provision establishes that "a durable, smooth, and dustless" surface is a precondition of approval by the Planning Commission of a gravel parking lot. Where this precondition is not satisfied, the Planning Commission has no authority to approve a gravel lot.

{¶ 29} In the present case, there is considerable evidence in the record supporting the common pleas court's conclusion that the gravel parking lot installed by Kreinest was not a "durable, smooth, and dustless surface" as required by M.Z.O. 20.07(B). At the evidentiary hearing, the Planning Commission presented the expert testimony of Anne McBride, the Maineville city planner, who testified about her inspection of the KolorKones parking lot in January 2012. In her testimony, McBride stated that she found ruts in the gravel lot which had standing water in them. Based upon her inspection and the ruts she found, McBride concluded the KolorKones gravel lot was not smooth and not durable. The Planning

Commission also submitted a copy of McBride's memorandum from January 2012, which included several photographs showing the ruts in the KolorKones lot with standing water in them.

{¶ 30} The only evidence in the record supporting Kreinest's position is testimony from Kreinest and the manager of KolorKones, Marcia Gaebel. Kreinest testified that, in his 24 years as owner and operator of a construction company, he found gravel parking areas to be smooth, durable, and dustless. He then explained in general terms how gravel lots are installed, and submitted photographs of the installation of the gravel lot at KolorKones. Additionally, both Kreinest and Gaebel testified that to their knowledge, none of their neighbors or customers have ever complained about the gravel lot. Kreinest presented no evidence that directly controverted McBride's evidence regarding the ruts in the KolorKones lot, or that established the gravel lot was smooth and durable notwithstanding the ruts.

{¶ 31} Thus, the common pleas court's decision was not based upon arbitrary criteria that was not contained within the M.Z.O. Rather, the court's decision was based on specific criteria promulgated in the M.Z.O.: that the gravel parking lot must provide a smooth, durable, dustless surface. Further, there was substantial, reliable, and probative evidence in the record which suggested that Kreinest did not meet the promulgated criteria. For these reasons, we disagree with Kreinest's contention that the common pleas court's decision was based on arbitrary criteria not contained within the standards of the M.Z.O.

{¶ 32} In addition, we find Kreinest's suggestion that it was improper for the common pleas court to consider the overall intent of the village and other "aesthetic issues" to be without merit. The general principle of statutory construction which provides that statutes relating to the same general subject matter must be read *in pari materia* applies to zoning ordinances, as well. *See Consol. Mgt., Inc.*, 6 Ohio St. 3d at 242. In the present case, the Planning Commission's authority to approve or deny Kreinest's request to maintain a gravel

parking lot emanates from M.Z.O. 2.06, which empowers the agency to "[r]eview and act on site plans as required by this Ordinance." Therefore, M.Z.O. 20.07 must be read *in pari materia* with the other provisions of the M.Z.O. providing direction to the Planning Commission regarding site plan review.

{¶ 33} M.Z.O. Chapter 30 is entitled "Site Plan Review." M.Z.O. 30.01(L) identifies the criteria the Planning Commission must use as the basis for its decision to approve or deny a site plan. Among those criteria is "Site Appearance and Coordination," which requires that "the site is designed in a manner that promotes the normal and orderly development of surrounding lands, and all site design elements are harmoniously organized in relation to topography, adjacent facilities, * * *." Further, M.Z.O. 30.01(A) states that the purpose of the site plan review is, in part, to "facilitate development in accordance with the Village's Comprehensive Plan." Page 29 of the Comprehensive Plan, adopted in 2007, makes clear that one of the village's goals is to "[p]reserve and enhance the Village Core as a distinct 'center' for the community."[3] In other words, in addition to the "smooth, durable, and dustless" criteria that M.Z.O. 20.07 required the Planning Commission to consider with respect to Kreinest's request, other portions of the M.Z.O. also provided direction for the Planning Commission's decision.

{¶ 34} Thus, the Planning Commission was not only authorized by the M.Z.O. to consider the intent of the village and other aesthetic issues in rendering decisions on site plans, it was required to do so. It is well-settled that "a municipality may properly exercise its zoning authority to preserve the character of designated areas * * *." *Cent. Motors. Corp. v. Pepper Pike*, 73 Ohio St.3d 581, 585 (1995). Therefore, it was appropriate for the common

3. It is undisputed that Kreinest's property is located within the "Downtown Core" zoning district. M.Z.O. Chapter 12 provides further guidance to the Planning Commission regarding the village's intent for development in the Downtown Core district.

pleas court to consider these factors, along with the criteria identified in M.Z.O. 20.07(B), in its review of the Planning Commission's denial of Kreinest's request.

{¶ 35} After a thorough review of the record, we find the common pleas court did not abuse its discretion by holding the preponderance of substantial, reliable, and probative evidence supported the Planning Commission's decision.

{¶ 36} In light of the foregoing, Kreinest's single assignment of error is overruled.

{¶ 37} Judgment affirmed.

PIPER, P.J., and M. POWELL, J., concur.