

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

HARLEY E. ROWE, et al.

C.A. No. 10CA009852

Appellees

v.

CARLISLE TOWNSHIP BOARD OF
ZONING APPEALS

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 10CV166111

Appellant

DECISION AND JOURNAL ENTRY

Dated: January 31, 2011

WHITMORE, Judge.

{¶1} Appellant, the Carlisle Township Board of Zoning Appeals (“Carlisle Township”), appeals from the judgment of the Lorain County Court of Common Pleas, ordering Carlisle Township to issue a zoning permit in favor of Appellees, Harley Rowe and Hynolds, LLC (collectively “Hynolds”). This Court affirms in part and reverses in part.

I

{¶2} During the summer of 2003, Hynolds acquired a piece of real property in Carlisle Township and began operating an adult-entertainment establishment, later known as The Brass Pole. After Hynolds sought to update a portion of the building and expand The Brass Pole’s entertainment area, Carlisle Township passed several zoning resolutions to regulate the zoning of adult-entertainment businesses and to prohibit the operation of such businesses within general business districts. The Brass Pole was located in a general business district. Thus, the Carlisle Township Board of Trustees sought to enjoin Hynolds from continuing to operate its

establishment as an adult-entertainment business. See *Carlisle Township Board of Trustees v. Hynolds, et al.*, Lorain County Common Pleas No. 03CV136412. Because The Brass Pole was operating before the enactment of the new zoning resolutions, the trial court in Case No. 03CV136412 held that Hynolds could “continue operating that portion of The Brass Pole in which nude dancers were already performing before [the zoning] regulations were implemented.” *Id.* Even so, the court determined that Carlisle Township’s zoning resolutions were constitutional and enjoined Hynolds “from using [the former barbershop area] of the property for nude dancing[.]” *Id.* Neither Carlisle Township, nor Hynolds appealed from the court’s judgment in Case No. 03CV136412.

{¶3} In December 2009, Hynolds applied for a zoning permit in order to expand its building’s office and add a bar area with seating. Carlisle Township Zoning Inspector Starlet Seman denied Hynolds’ permit by way of a letter. Inspector Seman’s letter relied on the judgment in Case No. 03CV136412 and informed Hynolds that the proposed expansion would violate Article III, Sections 302 and 308.05 of Carlisle Township’s zoning resolution. The letter also informed Hynolds that its proposed expansion violated sections of the zoning resolution related to parking, buffering, and signage. Subsequently, Hynolds appealed from Inspector Seman’s decision to deny the zoning permit. Carlisle Township considered Hynolds’ application for a permit at a public meeting and ultimately denied it, concluding that Hynolds was seeking to expand or alter a non-conforming use in violation of Resolution No. 2003-29.

{¶4} On February 3, 2010, Hynolds filed an appeal in the Lorain County Court of Common Pleas, challenging Carlisle Township’s decision to deny its zoning permit. Both parties filed briefs and exhibits in support of their respective decisions. Upon review of the record, the trial court determined that Carlisle Township erred by refusing to issue a zoning

permit. The trial court entered judgment in favor of Hynolds and ordered Carlisle Township to issue the permit.

{¶5} Carlisle Township now appeals from the trial court’s judgment and raises two assignments of error for our review. For ease of analysis, we consolidate the assignments of error.

II

Assignment of Error Number One

“THE TRIAL COURT ERRED IN REVERSING THE CARLISLE TOWNSHIP BOARD OF ZONING APPEALS’ DECISION[.]”

Assignment of Error Number Two

“THE TRIAL COURT ERRED IN FAILING TO RULE THAT, FOR PURPOSES OF A PRE-EXISTING, NONCONFORMING USE, UNDER ZONING LAW, EXPANDING A STRUCTURE THAT HOUSES AN ADULT-ENTERTAINMENT ESTABLISHMENT, UNLAWFULLY EXPANDS THE ADULT-ENTERTAINMENT ‘USE’ ITSELF, WHERE ADULT ENTERTAINMENT ACTIVITY WOULD BE OBSERVABLE FROM THE LOCATION OF THE PROPOSED EXPANSION AREA.”

{¶6} In its assignments of error, Carlisle Township argues that the trial court erred by reversing its determination that Hynolds’ expansion would violate Resolution No. 2003-29. Specifically, Carlisle Township argues that the proposed expansion constitutes an impermissible expansion of a non-conforming use.

{¶7} Administrative appeals initiated under R.C. 2506.04 require the trial court to “consider[] the entire record before it and ‘determine[] whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence.’” *Summit Cty. v. Stoll*, 9th Dist. No. 23465, 2007-Ohio-2887, at ¶9, quoting *Henley v. Youngstown Bd. of Zoning Appeals* (2000), 90 Ohio St.3d 142, 147. Based on its review, the trial court may “affirm, reverse, vacate, or

modify the order[.]” R.C. 2506.04. The trial court’s judgment “may be appealed by any party on questions of law.” *Id.* Whether the trial court abused its discretion is “[w]ithin the ambit of ‘questions of law’ for appellate court review.” *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34, fn.4. An appellate court’s review in such an instance, however, “does not include the same extensive power to weigh ‘the preponderance of substantial, reliable, and probative evidence,’ as is granted to the common pleas court.” *Henley*, 90 Ohio St.3d at 147; *Kisil*, 12 Ohio St.3d at 34, fn.4. Rather, we must affirm the trial court’s decision if such evidence exists in the record. *Summit Cty. v. Stoll*, 9th Dist. No. 24681, 2009-Ohio-6615, at ¶6, citing *Kisil*, 12 Ohio St.3d at 34. “Appellate courts must not substitute their judgment for those of an administrative agency or a trial court absent the approved criteria for doing so.” *Henley*, 90 Ohio St.3d at 147.

{¶8} Article III, Section 302 of Carlisle Township’s zoning resolution prohibits the conversion, enlargement, or structural alteration of any building used for any purpose other than that permitted in the zoning district, in the absence of a conditional zoning certificate. Article III, Section 308.05 provides, in relevant part, that “[n]o non[-]conforming use shall be enlarged, increased or extended to occupy a greater area of building or land than was occupied at the effective date of the adoption or subsequent amendment of this Resolution.” Both parties agree that the nude dancing that takes place at The Brass Pole is a non-conforming use of the property. Additionally, they agree that Hynolds’ proposed expansion amounts to the addition of an office, a changing room, and an additional bar with a seating area. The parties disagree as to whether the proposed expansion would amount to an enlargement of The Brass Pole’s non-conforming use. According to Hynolds, the proposed expansion does not violate Section 308.05 because the expanded area would not be used for nude dancing. Rather, the nude dancing would be contained to the area already designated for that purpose. According to Carlisle Township,

Hynolds' entire establishment constitutes a non-conforming use because nude dancing takes place there. Carlisle Township argues that, so long as Hynolds' entire building remains dedicated to The Brass Pole establishment, any expansion of the building automatically expands the non-conforming use therein, regardless of what activities might take place in the expanded areas.

{¶9} Carlisle Township focuses on the term “use” in support of its argument. Specifically, Carlisle Township relies upon R.C. 2907.39 and R.C. 503.51 to argue that “[a]pplicable zoning laws define adult-entertainment ‘use’ *** to include the entire ‘establishment,’ regardless of *where* ‘nude dancing[]’ *** activities occur within the establishment.” (Emphasis in original.) Neither statute, however, bears upon the term “use” with regard to a non-conforming use. R.C. 2907.39 merely defines an “adult entertainment establishment” as including a “nightclub, bar, juice bar, restaurant, bottle club, or similar commercial establishment *** that regularly features ** [p]ersons who appear in a state of nudity or seminudity[.]” R.C. 2907.39(A)(5) (including an “adult cabaret” in defining the phrase “adult entertainment establishment”); R.C. 2907.39(A)(3) (defining “adult cabaret”). Similarly, R.C. 503.51 only notes that the phrase “adult entertainment establishment” has the same meaning in R.C. 503.51 through R.C. 503.53 and R.C. 2907.39. Carlisle Township mistakenly equates the definition of “establishment” with the definition of “use.”

{¶10} As previously noted, Section 308.05 of Carlisle Township's zoning resolution provides that “[n]o non[-]conforming use shall be enlarged, increased or extended *to occupy a greater area of building or land than was occupied* at the effective date of the adoption or subsequent amendment of this Resolution.” (Emphasis added.) The plain language of Section 308.05 recognizes that it is possible for a non-conforming use to occupy less than the entirety of

a building. The section merely prohibits the occupation of “a greater area” of a building than was previously occupied by the non-conforming use. Section 308.05. A plain language reading of Section 308.05 does not support Carlisle Township’s argument that an entire establishment, and therefore an entire building, “takes on the *character* of ‘adult-entertainment use’ when it ‘regularly-features’” nude dancers. (Emphasis in original.) See *Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718, at ¶14 (holding that a clear and unambiguous statute must be applied as written, with “neither additions to *** nor subtractions therefrom”). Rather, the plain language of Section 308.05 supports the interpretation that a single building may contain both conforming and non-conforming uses.

{¶11} The record reflects that The Brass Pole contains conforming uses. Even at the public hearing on Hynolds’ application for a permit, Inspector Seman indicated that the existing bar in The Brass Pole constitutes a conforming use. The same would be true of a bathroom, kitchen, or office. It is the nude dancing that occurs at The Brass Pole that is the non-conforming use.¹ The trial court in Case No. 03CV136412 recognized this when it wrote that “that *portion* of The Brass Pole in which nude dancers were already performing is a valid non[-]conforming use[.]” (Emphasis added.) The court in that case only enjoined Hynolds from using another “*portion* of the property for nude dancing[.]” (Emphasis added.) Were it otherwise, The Brass Pole would be for forever locked into zoning perpetuity, never capable of alteration, no matter what that alteration might be, because any alteration or expansion would violate the non-conforming use doctrine. Neither the plain language of Carlisle Township’s zoning resolution, nor the judgment that both parties are bound by in Case No. 03CV136412, supports that result.

¹ Hynolds concedes that the nude dancing that occurs at The Brass Pole is a non-conforming use. It further concedes that it is bound by the judgment in Case No. Case No. 03CV136412,

As such, the trial court correctly rejected Carlisle Township's argument to the contrary. Carlisle Township's second assignment of error, which addresses the enlargement of the non-conforming use of Hynolds' property, is overruled.

{¶12} As to the trial court's ultimate determination to reverse Carlisle Township's decision and order it to issue Hynolds' permit, we must conclude that the trial court erred in so ruling. The record reflects, and Hynolds concedes, that there are additional problems with the plans Hynolds submitted in support of its application. Specifically, parking, buffering, and signage problems remain. These problems were noted in Inspector Seman's letter, denying Hynolds' proposed expansion, and were briefly addressed at the public hearing on the application for the permit. Further, Carlisle Township cited the foregoing problems as additional reasons for denying Hynolds' permit and Hynolds did not challenge the denial of its permit on these bases in its notice of appeal before the common pleas court. Given that Hynolds' application is defective beyond the non-conforming use issue due to the parking, buffering, and signage problems, Carlisle Township did not err by denying Hynolds' application as it currently exists. Therefore, we must conclude that the trial court incorrectly reversed Carlisle Township's ultimate decision to deny Hynolds' application for a permit. Carlisle Township's first assignment of error is sustained.

III

{¶13} Carlisle Township's first assignment of error is sustained and its second assignment of error is overruled. The judgment of the Lorain County Court of Common Pleas is affirmed in part and reversed in part.

Judgment affirmed in part,

which prohibits nude dancers from performing in any area where nude dancing was not already being performed before the passage of the zoning resolutions at issue.

and reversed in part.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to all parties equally.

BETH WHITMORE
FOR THE COURT

MOORE, J.
BELFANCE, P. J.
CONCUR

APPEARANCES:

DENNIS P. WILL, Prosecuting Attorney, and MATTHEW A. MISHAK, Assistant Prosecuting Attorney, for Appellant.

SCOTT RYAN NAZZARINE, H. LOUIS SIRKIN, and JENNIFER M. KINSLEY, Attorneys at Law, for for Appellees.