

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Orange Barrel Media et al., :
Appellants-Appellants, :
v. : No. 12AP-447
(M.C. No. 2010 EVA-60307)
City of Columbus, Ohio et al., : (ACCELERATED CALENDAR)
Appellees-Appellees. :

D E C I S I O N

Rendered on December 28, 2012

Vorys, Sater, Seymour and Pease LLP, Bruce L. Ingram, Joseph R. Miller, and Christopher L. Ingram; Smith & Hale LLC and Jeffrey L. Brown, for appellants.

Richard C. Pfeiffer, Jr., City Attorney, and Wesley M. Phillips, for appellees.

APPEAL from the Franklin County Municipal Court,
Environmental Division

SADLER, J.

{¶ 1} Appellants, Orange Barrel Media and Riverwatch Tower Condominium Association, appeal from a judgment of the Franklin County Municipal Court, Environmental Division, that dismissed in part and affirmed in part a decision of the Graphics Commission ("commission") for the City of Columbus. For the reasons that follow, the judgment of the trial court is reversed and this matter is remanded to that court for further proceedings.

I. BACKGROUND

{¶ 2} This appeal concerns appellants' request for a variance and special permit allowing the display of a 1,400 square foot, off-premise banner on the façade of the Riverwatch Tower Condominium building. The subject property is zoned C-4, Regional Scale Commercial, and is subject to the restrictions of the Urban Commercial Overlay. Together, these zoning restrictions require one to obtain a variance and special permit in order to display an off-premise sign on property located within the specified overlays. On two different occasions, the commission approved the banner on a temporary basis, but then denied the instant request seeking approval that was more permanent in nature.

{¶ 3} Appellants filed an appeal to the Franklin County Municipal Court, Environmental Division. In the trial court, appellants argued the zoning restrictions were unconstitutional, the commission applied an incorrect standard, and the commission erred in failing to make findings of fact and conclusions of law. Appellants also filed a motion to present additional evidence. The purpose of the motion was to submit to the trial court evidence that was presented to the commission but omitted from the record.

{¶ 4} The trial court concluded appellants sought a use variance over which the commission does not have jurisdiction and, instead, has to be obtained directly from city council. Additionally, the trial court held that a special permit could not be obtained without a variance. Therefore, without ruling on appellants' constitutional challenges and motion to present additional evidence, the trial court dismissed the appeal concerning the variance and affirmed the commission's decision denying the request for the special permit.

II. ASSIGNMENTS OF ERROR

{¶ 5} This appeal followed, and appellants bring the following five assignments of error for our review:

First Assignment of Error:

The Municipal Court erred by concluding that the City of Columbus Graphics Commission ("Graphics Commission") lacked jurisdiction to consider the requested variance where, consistent with its past practice, the Graphics Commission has been given express authority under the City Code to decide such a variance.

Second Assignment of Error:

The Municipal Court erred by construing Appellants' application as a request for a use variance instead of an area variance where Appellants' application relates only to signage and in no way affects the use of the property consistent with its zoning classification.

Third Assignment of Error:

The Municipal Court erred by determining that a Special Permit could not be obtained because of the lack of a variance and the Graphics Commission could not grant such a variance.

Fourth Assignment of Error:

The Municipal Court erred by failing to rule on the merits of Appellants' Motion to Present Additional Evidence even though the transcript does not contain a report of all evidence admitted or proffered by the Appellants and despite the Court's acknowledgement that the Graphics Commission failed to file conclusions of fact supporting its decision with the transcript.

Fifth Assignment of Error:

The Municipal Court erred by failing to rule that the ban on off-premises communications, including all off-site advertisements as it applies to Appellants, is unconstitutional pursuant to controlling Supreme Court of Ohio precedent.

III. STANDARD OF REVIEW

{¶ 6} As stated in *Athenry Shoppers Ltd. v. Dublin Planning and Zoning Comm.*, 10th Dist. No. 08AP-742, 2009-Ohio-2230, ¶ 14, R.C. 1901.183(I) grants jurisdiction to the environmental division of a municipal court to hear appeals from "any final order of any * * * commission * * * that relates to a local building, * * * zoning * * * ordinance, or regulation, in the same manner and to the same extent as in similar appeals in the court of common pleas." In turn, R.C. 2506.01(A) provides that "every final order * * * or decision of any * * * commission, department, or other division of any political subdivision of the

state may be reviewed by the court of common pleas of the county in which the principal office of the political subdivision is located."

{¶ 7} R.C. 2506.04 sets forth the standard of review for appeals taken pursuant to R.C. 2506.01. It provides:

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. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from with instructions to enter an order, adjudication, or decision consistent with the findings or opinion of the court. The judgment of the court may be appealed by any party 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.

{¶ 8} Although a review under R.C. 2506.04 is not de novo, it often resembles a de novo proceeding because the reviewing court weighs the evidence in the "whole record" in determining whether the administrative decision is supported by the preponderance of substantial, reliable, and probative evidence. *Athenry Shoppers*, at ¶ 16, citing *Dudukovich v. Lorain Metro. Hous. Auth.*, 58 Ohio St.2d 202, 206-07 (1979). Analogizing the R.C. 2506.04 review standard to the standard set forth in R.C. 119.12, the *Dudukovich* court noted that "'the Court of Common Pleas * * * must give consideration to the entire record * * * and must appraise all such evidence as to the credibility of [the] witnesses, the probative character of the evidence and the weight to be given it.'" *Id.* at 207, quoting *Andrews v. Bd. of Liquor Control*, 164 Ohio St. 275 (1955), paragraph one of the syllabus. Therefore, the reviewing court must weigh the evidence in the record to determine whether there exists a preponderance of reliable, probative, and substantial evidence to support the agency decision. *Id.* However, the *Dudukovich* court noted:

We caution, however, to add that this does not mean that the court may blatantly substitute its judgment for that of the agency, especially in areas of administrative expertise. The key term is "preponderance." If a preponderance of reliable,

probative and substantial evidence exists, the Court of Common Pleas must affirm the agency decision; if it does not exist, the court may reverse, vacate, modify or remand.

Id.

{¶ 9} We have characterized the R.C. 2506.04 standard as a hybrid form of review due to the balance the reviewing court must maintain. *Athenry Shoppers* at ¶ 17, citing *Elbert v. Bexley Planning Comm.*, 108 Ohio App.3d 59, 66 (10th Dist.1995). The reviewing court 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.*

{¶ 10} Courts of appeal apply a more limited standard of review in an R.C. 2506.04 appeal. *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147 (2000), citing *Kisil v. Sandusky*, 12 Ohio St.3d 30, 34 (1984). R.C. 2506.04 grants courts of appeal the power to review the judgment of a lower court only on questions of law. Courts of appeal do not have the same extensive power to weigh the preponderance of substantial, reliable, and probative evidence as is granted to the lower courts. *Id.*

IV. DISCUSSION

{¶ 11} In their first assignment of error, appellants challenge the trial court's conclusion that the commission did not have jurisdiction to issue the requested variance. Appellees agree with appellants' argument and contend appellants' first assignment of error has merit.

{¶ 12} Columbus City Code 3372.606 provides, in relevant part: "In addition to signs prohibited in Chapter 3375, the following types of signs shall not be permitted: off-premise signs." However, Columbus City Code 3372.603(I) provides: "The Graphics Commission may consider a variance request to any graphics standard or graphics requirement of this overlay. Nonconforming graphics and routine maintenance and in-kind replacement of materials are exempt from the graphics standards and requirements of this overlay and are subject to Section 3381.08."

{¶ 13} Based on the above, the commission has expressly been given jurisdiction to consider the requested variance and special permit. Accordingly, we conclude the trial court erred in finding otherwise, and we sustain appellants' first assignment of error.

{¶ 14} Once the trial court determined the commission had no jurisdiction over use variances, the trial court found appellants' arguments regarding the constitutionality of the zoning restrictions and the merits of the commission's decision to be moot; therefore, the trial court did not render a decision on these issues. Thus, appellants' remaining assignments of error challenge issues either not yet decided by the trial court or that depend, in part, on whether additional evidence is permitted into the record. Because our disposition of appellants' first assignment of error requires a reversal of the trial court's judgment and a remand to that court, the arguments the trial court determined to be moot will be restored, and a decision on appellants' second, third, fourth, and fifth assignments of error would be premature at this juncture. *Coburn v. Auto-Owners Ins. Co.*, 189 Ohio App.3d 322, 2010-Ohio-3327 (10th Dist.); *In the Matter of Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co., Lincoln-Mercury Div.*, 10th Dist. No. 91AP-1493 (Sept. 24, 1992).

V. CONCLUSION

{¶ 15} For the foregoing reasons, appellants' first assignment of error is sustained, and appellants' second, third, fourth, and fifth assignments of error are rendered moot. The judgment of the Franklin County Municipal Court, Environmental Division, is hereby reversed, and this matter remanded to that court for further proceedings.

Judgment reversed; cause remanded.

TYACK and FRENCH, JJ., concur.
