

**IN THE COURT OF APPEALS OF OHIO
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY**

REED HAVEL,

Appellee,

- vs -

BOARD OF ZONING APPEALS,
CITY OF KENT,

Appellant.

CASE NO. 2024-P-0010

Administrative Appeal from the
Court of Common Pleas

Trial Court No. 2023 CV 00188

OPINION

Decided: September 16, 2024
Judgment: Reversed and remanded

Chad E. Murdock, P.O. Box 334, Rootstown, OH 44272 (For Appellee).

Hope L. Jones, The City of Kent, Ohio, Law Director, and *Eric R. Fink*, Assistant Law Director, 320 South Depeyster Street, Kent, OH 44240; *Mark S. Fusco* and *Douglas M. Eppler*, Walter Haverfield LLP, 1500 West 3rd Street, Suite 300, Cleveland, OH 44113 (For Appellant).

ROBERT J. PATTON, J.

{¶1} Appellant, Board of Zoning Appeals, City of Kent (“Kent BZA”), appeals the decision of the Portage County Court of Common Pleas, which reversed the decision of the Kent BZA, denying a certificate of non-conforming use to appellee, Reed Havel (“Havel”). In its order, the trial court additionally held that the City of Kent’s zoning

restriction, which limits the occupancy of single family¹ dwellings located in R-3 high-density residential zoning districts to no more than two unrelated individuals, to be unconstitutional. For the following reasons, we reverse and remand.

{¶2} On appeal, the Kent BZA asks this Court to determine whether the trial court erred when it made a finding that property owner, Havel, was not required to obtain a non-conforming use certificate to bring his property into compliance with the City of Kent's zoning ordinances. Additionally, the Kent BZA asks us to determine whether the application of the City of Kent's zoning code, as applied, is constitutional. We hold, that the trial court erred when it misapplied the City of Kent's zoning code to Havel's property. Under our reading of the City of Kent's zoning code, Havel is required to obtain a non-conforming use certificate to use his property as intended within the R-3 zoning district. We further hold that the application of the City of Kent's zoning code, which creates a restriction in the R-3 zoned district limiting occupancy of single family homes to no more than two unrelated individuals, is constitutional as applied. Because the trial court misapplied the zoning code, we reverse and remand this case to the Portage County Court of Common Pleas for a determination on whether Havel was or was not entitled to a prior non-conforming use certificate, consistent with this Court's opinion.

{¶3} The following facts have been derived from the record, including transcripts from the Kent BZA hearing on Havel's appeal, and the transcripts from Havel's administrative appeal of the Kent BZA's decision to the Portage County Court of Common Pleas.

1. The term "single family" is hyphenated inconsistently both throughout the City of Kent's Codified Ordinances and the parties' briefing. To avoid confusion or distraction, all uses of "single family" will be without hyphenation, even if the original quote contained a hyphen.

{¶4} Havel is a realtor and real estate investor who owns property through his business, Leader Homes LLC. The property subject to this appeal is located on Columbus Street in the City of Kent (the “Property”). Havel purchased the six-bedroom Property in 2022 from his parents. Havel’s parents purchased the Property in 1994. The Property resides in an R-3 high-density residential zoning district. The R-3 zoning designation limits the number of occupants of single family properties to no more than two unrelated individuals, but without restriction to the number of occupants who meet the City of Kent’s codified definition of “family.”

{¶5} According to Havel, during the time Havel’s parents owned the Property they regularly housed varying numbers of unrelated individuals with disabilities together with their own family, in violation of the City of Kent’s zoning ordinances. Numerous complaints were filed with the City of Kent’s Community Development Department (“Kent CDD”) resulting in an investigation into the use of the subject Property. The result of those investigations culminated in multiple notices and warnings of violation issued to the then owners, Havel’s parents. Havel’s mother, Tatsyana Havel (“Tatsyana”), who at one point during her ownership of the Property wrote a letter to the Kent CDD asserting that the Property was being used strictly as a single family residence.

{¶6} The record indicates that the Property was used for a significant number of years prior to Tatsyana’s ownership as a Rooming House, also without approval from the Kent CDD, when in the possession of the prior owner, Michael Krohn (“Krohn”). Tatsyana testified to the trial court that when she and her husband purchased the Property in 1994 there were five college girls living in the Property. Warnings of violation addressed to Krohn from the Kent CDD describe the prior use as consistent with the City zoning code’s

definition of a “Rooming House” or “Boarding House” (terms used interchangeably and defined the same under Kent’s zoning code, with the exception that a Boarding House requires that the owner also live in the home).

{¶7} Havel asserts that the Property was always used by his family to house individuals with disabilities. Tatsyana stated that at times she would house up to four unrelated individuals with disabilities in the Property. At the time of the appeal to the BZA, an investigation by the Kent CDD revealed six unrelated individuals were residing at the Property, during Havel’s ownership of the Property. Havel stated at both the November 21, 2022, Board of Zoning Appeals hearing, and to the trial court during the July 11, 2023, administrative appeal hearing, that he purchased the Property with the intent to use it in the same manner as his parents. However, at the appeal to the Kent BZA, Havel stated that he lived at a separate residence, and currently had four unrelated individuals living in the Property. (This conflicts with information discovered during Kent CDD’s investigation, but later it came to light that two of the six were brothers). Havel explained at the BZA appeal hearing that he had not yet begun housing individuals with disabilities but had put out a request to have those individuals referred to him. After discussions with the Kent CDD about how to regain compliance with the legal uses for the Property, Havel determined applying for a non-conforming use certificate would be the best route. Havel stated that he sought the non-conforming use certificate so that he could continue to allow the occupants to reside there.

{¶8} On September 2, 2022, Havel filed his application with the Kent CDD for the non-conforming use certificate for the Property. Based on the records of the Property’s use history, the Kent CDD denied Havel’s application, explaining that he did not provide

evidence to support the assertion that continuous non-conforming use existed and predated the zoning ordinance. Havel appealed to the Kent BZA. Havel appeared pro se before the Kent BZA at the hearing on his appeal. During the November 21, 2022, hearing, Havel again explained his intended use for the Property, “I’m looking to have that property as a rooming house for the individuals that currently occupy it.” At the hearing, Havel additionally asserted that the zoning restriction as applied was unconstitutional, basing his assertion on an article he read where similar zoning restrictions were declared unconstitutional in a case involving the City of Bowling Green.² The Kent BZA denied Havel’s appeal, explaining that Havel did not produce records that could establish that the Property was used as a Rooming House continuously for the required period.

{¶9} On administrative appeal to the trial court, Havel’s argument shifted. Havel, now represented, asserted that he did not need the non-conforming use certificate for the Property after all, but instead that the Kent CDD misapplied the zoning code. Havel argued that his use as a Rooming House was in compliance with the Code. Havel further argued that the single family zoning restriction prohibiting more than two unrelated individuals from occupying the Property was unconstitutional. Havel argued that the application of the Code was analogous to the zoning code in another Ohio case where unrelated occupants were restricted, *Yoder, supra*.

{¶10} The hearing on Havel’s administrative appeal was held on July 11, 2023. The trial court ruled in favor of Havel. In an order filed January 30, 2024, the trial court

2. In the City of Bowling Green case, a similar single family residence restriction was declared unconstitutional by the 6th Circuit, after a group of tenants and property owners challenged the zoning ordinance. *Yoder v. City of Bowling Green, Ohio*, 2019 WL 415254, (N.D. Ohio 2019). Ultimately the Court in that case declared the restriction arbitrary based on its application, which was intended to control population density, but had no impact on population density.

reversed Kent BZA's decision. In its order, the trial court stated that it agreed with Havel that the Kent CDD misapplied the zoning code, and that Havel's use of the Property was in compliance. The trial court concluded that a non-conforming use certificate was not required for his intended use. The trial court further held that the Kent CDD's application of the zoning code was unconstitutional based on the reasoning set forth in the *Yoder* case, *supra*. The Kent BZA filed a Motion to Reconsider on February 13, 2024, which was denied by the trial court on February 15, 2024.

{¶11} Appellant, Kent BZA, now timely appeals and asserts two assignments of error for review:

{¶12} [1.] "The Trial Court erred by ruling that the record did not contain competent, credible and substantial evidence to support the Appellant's Board of Zoning Appeal's denial of Appellee's application for non-conforming use of the single family dwelling unit on 248 Columbus Street in Kent, Ohio."

{¶13} [2.] "The Trial Court erred by ruling that the Township Board's denial of Appellant's Board of Zoning Appeal's denial of Appellee's application for non-conforming use of the single family dwelling unit on 248 Columbus Street in Kent, Ohio was 'arbitrary, capricious and unreasonable' and 'unconstitutional.'"

Standard of Review

{¶14} "Upon review of an administrative appeal, a court of common pleas considers whether the decision to grant or deny a certificate 'is unconstitutional, illegal, arbitrary, capricious, unreasonable or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record.' R.C. 2506.04. Thereafter, an appellate court's review of the judgment of the trial court is more limited than that of the

court of common pleas (citations omitted).” *E. Main St. Lofts v. Kent Planning Comm.*, 2019-Ohio-5312, ¶ 5.

{¶15} “However, “[w]hile the court of common pleas is required to examine evidence, the court of appeals may not weigh the evidence.” *Id.* at 8, quoting *Shelly Materials, Inc. v. City of Streetsboro Planning and Zoning Comm.*, 2019-Ohio-4499, ¶ 17.

{¶16} “[R.C. 2506.04] grants a more limited power to the court of appeals to review the judgment of the common pleas court only on “questions of law,” which 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. Within the ambit of “questions of law” for appellate court review would be abuse of discretion by the common pleas court.” (Bracketed text in original.) *Id.* at ¶ 5, quoting *Kisil v. Sandusky*, 12 Ohio St.3d 30, 34 (1984). See also *Boice v. Ottawa Hills*, 2013-Ohio-4769, ¶ 7; *Snyder v. Leroy Twp. Bd. of Zoning Appeals*, 2024-Ohio-1856, ¶ 10.

{¶17} “The term “abuse of discretion” is one of art, connoting judgment exercised by a court which neither comports with reason, nor the record” *State v. Flanagan*, 2015-Ohio-5528, ¶ 42, citing *State v. Ferranto*, 112 Ohio St. 667, 676-678.

{¶18} Therefore, we will review the trial court’s decision on questions of law which will include whether the trial court abused its discretion in finding that that Kent BZA’s administrative order was unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence in the record. *Boice* at 7.

{¶19} Kent BZA’s first assignment of error asserts that the trial court erred in its ruling that the record did not contain the requisite competent, credible, and substantial

evidence to support the Kent BZA's denial of Havel's non-conforming use certificate. However, the trial court applied the zoning code and determined that Havel's circumstances did not require a non-conforming use certificate and that Havel's Property was in compliance with the zoning code. In Kent BZA's second assignment of error, they assert that the trial court erred in holding that the restriction requiring Havel to acquire a non-conforming use certificate is unconstitutional. To address Kent BZA's first assignment of error, this Court must first consider the functional application of the zoning code.

Application of the Zoning Code

{¶20} Interpreting the zoning code begins with the definitions set forth in chapter 1102 of the City of Kent's Codified Ordinances (the "Code"). Definitions are presented in the Code in alphabetical order and are numbered. Chapter 1102 of the Code contains 246 definitions. The confluence of multiple definitions and other provisions within the Code form the conclusion that "no more than two unrelated individuals in a single family residence restriction" in the R-3 zoned district.

{¶21} What follows are the relevant Code definitions under the City of Kent's Codified Ordinances. The numbers next to each defined word indicate the number attributed to the definition within section 1102.03 of the Code. However, they are presented below not in chronological order, but instead, in the logical order of application.

{¶22} Immediately preceding the definitions in section 1102.03 of the Code, the following instruction is given: "[u]nless otherwise specifically provided, or unless clearly required by the context, the words and phrases defined in this section must have the meaning indicated when used in this Code."

{¶23} The relevant Code definitions from chapter 1102 are as follows:

(69) **DWELLING:** Any building or portion thereof, which is designed or used primarily for residential purposes, including single family, a household unit, or three (3) or more dwelling units.

(75) **DWELLING UNIT:** Any room or group of rooms located within a dwelling and forming a residential household unit with facilities that are used or intended to be used for living, sleeping, cooking and eating, with a restroom(s) and bathing facility(ies) to be utilized by a family, a household unit, as defined in this Chapter, or three (3) or more unrelated individuals.

(107) **HOUSEHOLD UNIT:** A family, single family and one (1) unrelated individual, a single individual, (2) two unrelated individuals, or any of these four (4) designations and a caregiver(s) (as defined by this Code) residing in a dwelling unit. Individuals residing in a(n) apartment complex, rooming house, boarding house, hotel, motel, group dwelling, dormitory, fraternity house, or sorority house, together, do not constitute a household unit.

(79) **FAMILY:** Individuals who are related by marriage, legal recognized civil union, adoption, or are within three (3) degrees (or fewer) of consanguinity. * * *

(73) **DWELLING, SINGLE FAMILY:** A building consisting of a single dwelling unit.

(105) **HOUSE, BOARDING:** A residential building originally built as a single family or two-family dwelling that has been approved by the Planning Commission and/or the Community Development Department to house three (3) to fifteen (15) unrelated individuals, one of whom is the owner of the dwelling unit. Boarding houses expressly exclude fraternity and sorority houses.

(106) **HOUSE, ROOMING:** A residential building originally built as a single family or two-family dwelling that has been approved by the Planning Commission and/or the Community Development Department to house three (3) to fifteen (15) unrelated individuals. Rooming houses expressly exclude fraternity and sorority houses.

{¶24} Additionally, necessary to creating the restriction, is a provision found in chapter 1105 entitled “Conditions Applicable to Specific Land Uses.” Under section

1105.54 of this chapter of the Code are conditions applicable for Rooming Houses and Boarding Houses, which are distinct from single family dwellings:

(b) Conditions.

(3) Any group of persons meeting one (1) of the designations of a Household Unit as defined in this Code is permitted to reside in a single family dwelling.

{¶25} The condition imposed on single family dwellings, permitting only *one of the designated* configurations enumerated in the definition of a Household Unit is crucial in the application of the Code to create the single family dwelling restriction. Without this added condition applied, a single family dwelling, as defined, would refer to the definition of a dwelling unit, which would allow for habitation by a family, household unit, or three or more unrelated individuals. It is the condition in section 1105.54(b)(3) that caps the number of unrelated individuals that may reside in a single family dwelling to no more than two, as it dictates that *only one* of the designated configurations of occupants articulated in the definition of a Household Unit are permitted to reside in a single family dwelling.

{¶26} An instruction given in chapter 1101 of the Code entitled, “Title, Interpretation and Conflict” gives further explanation on how to apply the Code’s restrictions. In section 1101.02 it states, “In their interpretation and application, the provisions of this Code * * * are the minimum requirements for the promotion of public health, safety, morals, and general welfare.” In 1101.03 it is explained, “If any of the requirements or regulatory provisions of this Code are in conflict or are inconsistent with each another [*sic*], *the more restrictive or greater requirement applies.*” (Emphasis added.)

{¶27} Havel's Property is located in the R-3 High Density Residential District in the City of Kent. Section 1103.11 of the Code, entitled "R-3: HIGH DENSITY RESIDENTIAL DISTRICT" defines the permitted uses for properties located within this zoned district.

{¶28} The purpose for the R-3 zoning district is stated in section 1103.11, "This district is established to encourage single family residential development at high densities in areas of existing development of such density and thereby providing a more orderly and efficient extension of public facilities." The permitted uses in the R-3 zoning district are accessory buildings, home businesses (limited), single family dwellings, and two-family dwellings.

{¶29} Reading the relevant definitions together, the Code logically dictates that a dwelling, as defined, can consist of one or more dwelling units, which could be inhabited by various configurations of occupants. Additional conditions presented later in the Code narrow down exactly how specific dwellings are permitted to be used depending on what district they are zoned in. Specifically, Havel's property is a single family dwelling located in zone R-3, a high density residential district which serves the purpose of encouraging single family residential development at high densities to efficiently provide public facilities. A single family dwelling is described as a "building consisting of a dwelling unit," which allows for a family, a household unit, or three or more unrelated individuals to occupy it. However, a condition is later incurred when 1105.54(b)(3) is applied, "[a]ny group of persons meeting one (1) of the designations of a Household Unit as defined in this Code is permitted to reside in a single family dwelling." This condition requires that only one of the designations under the definition of a "household unit" may live in Havel's

property. In other words, single family residences may only be occupied by a family, a single family plus one unrelated individual, a single individual, or two unrelated individuals. Rooming Houses and Boarding Houses are expressly excluded from the district as the definition of Household Unit states, “Individuals residing in [a] * * * rooming house, [or] boarding house * * * do not constitute a household unit.”

{¶30} Based on the condition of use set forth in section 1105.54(b)(3) and the definition of a Household Unit, the Code restricts Havel’s use of the Property to renting to no more than two unrelated individuals.

{¶31} Havel, in his brief, contends that his use of the Property is permitted under the zoning code, and that the Kent CDD has been applying the code incorrectly, arguably for decades. The trial court in its order, agreed, stating, “the City of Kent’s own Codified Ordinance (KCO), which defines a “dwelling unit” and a “dwelling” as “a room or group of rooms” and “any building or portion thereof” intended for use by “a single family, a household unit, or three (3) or more unrelated individuals. * * *” In fact, [Havel’s] intended use of the subject premises is fully consistent with the zoning district in which the subject premises is located since the R-3 District is a high-density area.” That assertion is an incorrect application of the Code as it stops short as it applies only two of the three definitions that pertain to Havel’s property. All of the definitions for Dwelling, Dwelling Unit, Single Family Dwelling, Family, and Household Unit plus the condition in section 1105.54(b)(3) must be read together in *pari materia*. Together, they create the restriction requiring the issuance of a non-conforming use certificate in the R-3 District for Havel’s intended use as stated.

{¶32} Therefore, Havel’s use of the property is in violation of the City of Kent’s zoning ordinances and a non-conforming use certificate would be required to bring the Property into compliance with the Code.

{¶33} Havel stated to the trial court that his intended use for the Property is to house more than four people with disabilities. This intended use is consistent with the definition of a Rooming House. A Rooming House is defined as, “[a] residential building originally built as a single family or two-family dwelling that has been approved by the Planning Commission and/or the Community Development Department to house three (3) to fifteen (15) unrelated individuals * * *.” Kent City Code 1102.03. If Havel’s reading of the Code were true, the application of the Code should stop after applying Dwelling and Dwelling Unit, and the definition of a Rooming House would be superfluous, violating fundamental principles of statutory construction. The rules of statutory construction demand interpreters of the law to give meaning to every word. *See State v. Cefalo*, 2012-Ohio-5594, ¶ 20. “Statutory language ‘must be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative.” *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 2002-Ohio-4172, ¶ 26, citing *State ex. Rel. Myers*, 95 Ohio St. at 372-373.

{¶34} Further, without moving to the second step of the analysis and applying the *conditions* of the zoning code that define who can constitute a household unit, there would be essentially no occupant restriction on Havel’s property as to the number of occupants that could reside within the Property, related or otherwise. With that logic, there would

also be no need to further define distinctions between single family dwellings or multi-family dwellings or to define Rooming Houses at all. Further, and most fatal to Havel's argument, is that his logic demands that there would be no restriction on any single family dwelling in the City of Kent from housing more than two unrelated individuals in the zoning code, or two families, or multiple families. Accordingly, Havel's argument regarding the constitutionality of the restriction would become moot.

{¶35} Here, the trial court abused its discretion when it misapplied the Code to Havel's property and determined that the Property was compliant with the City of Kent's zoning restrictions.

First Assignment of Error

{¶36} Having established that the two unrelated individuals restriction applies to Havel's property, we move forward to address Kent BZA's first assignment of error.

{¶37} The Kent BZA contends that the trial court erred when it ruled that the denial of Havel's non-conforming use certificate was unsupported by credible, competent evidence.

{¶38} As stated above, R.C. 2506.04 grants a limited power to this Court to review the judgment of the trial court. *E. Main St. Lofts* at ¶ 5. Keeping within the limited scope of review, we look to the record to review the judgment of the common pleas court only on questions of law.

{¶39} Havel applied for a non-conforming use certificate to bring the Property he recently purchased from his parents into compliance with the City of Kent's zoning ordinances. Havel stated at the Kent BZA hearing on appeal that his intended use was to house four unrelated individuals, and to use the Property consistent with the Code's

definition of a Rooming House. Rooming Houses are expressly prohibited in the R-3 zoning district without a non-conforming use certificate granting a variance from the existing rules.

{¶40} To qualify for a non-conforming use certificate, section 1110.06(f) states:

[T]o issue a certificate of nonconforming use * * *

(1) The burden is on the landowner or land user to establish that the preexisting use was legal at the time the use was established,

(2) The burden is on the land owner or land user to establish that the preexisting use has been "continuous" * * *.

{¶41} Section 1110.06(d) further states:

In the event a dispute over the lapse of a conforming use arises, a presumption is hereby created that a lapse has occurred. *The individual or entity claiming the nonconforming use then bears the burden by proving the use has been continuous by a preponderance of the evidence.* Continuous use is defined as no interruption of use for more than two (2) consecutive calendar years. (Emphasis added.)

{¶42} A letter from the Development Planner to the Assistant Law Director in 1996 indicates that the previous Property owners, Havel's parents, no longer had a desire to pursue a non-conforming use certificate as they planned to use the Property as a single family residence. A separate letter to the tenants residing in the Property under a lease between the tenants and Tatsyana indicates that Tatsyana was aware of the unrelated individuals restriction and instructs the occupants that they can have no more than two unrelated individuals living in the Property, as the Property is zoned for single family use. The letter was dated October 7, 2001.

{¶43} Reviewing the record for an abuse of discretion, and without weighing the evidence, this Court is required to limit the scope of inquiry to only whether the trial court

abused its discretion when it ruled in favor of Havel and against the Kent BZA. *Henley*. The trial court's reading of the Code determined that no restriction was imposed on Havel's property, and that the Property complied with the Code. Assuming *arguendo* that were true, then Kent BZA's denial of a non-conforming use certificate would be moot. However, because of the misapplication of the Code, the trial court determined that Havel's use of the Property was permitted under the Code, and no certificate of non-conforming use is required. We disagree.

{¶44} The restriction limiting unrelated individuals in Havel's R-3 zoned property did in fact apply, and the trial court abused its discretion when it improperly applied the Code and determined that Havel did not require a non-conforming use certificate.

{¶45} Kent BZA's first assignment of error is with merit.

Second Assignment of Error

Constitutionality

{¶46} The same standard applies when reviewing the constitutionality of the City of Kent's two unrelated individuals restriction. *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147.

{¶47} Reviewing for the constitutionality of the two unrelated occupants restriction, two challenges can be made. "A landowner can challenge the constitutionality of a zoning ordinance in two ways: first, a landowner can allege that a zoning ordinance is unconstitutional as applied to a particular parcel of land, * * * [and] second, a landowner may allege that a zoning ordinance as applied to property constitutes a 'taking' in violation of the Fifth Amendment to the United States Constitution, entitling the owner to

compensation. U.S.C.A. Const. Amend. 5.” *Clarke v. Warren Cty. Bd. of Commrs.*, 2002-Ohio-6006, ¶ 15.

{¶48} Kent BZA contends that the trial court erred in ruling that the denial of Havel’s application for a non-conforming use certificate was “arbitrary, capricious, and unreasonable,” and “unconstitutional,” because the restriction itself was unconstitutional as applied. Again, if the trial court’s logic in application were followed, the constitutionality of the restriction would be moot. As we have determined that the restriction does in fact exist and does apply to Havel’s property, we look to the constitutionality of its application.

{¶49} Havel and the trial court assert that *Yoder v. City of Bowling Green*, N.D. Ohio, Western Division, 2019 WL 415254 is analogous to this case. However, the circumstances surrounding the application of the restrictions in *Yoder* and the present case are different, and those differences change the impact on restricted individuals.

{¶50} In *Yoder*, a group of homeowners and tenants challenged the constitutionality of the City of Bowling Green’s restriction on occupancy in single family homes by three or more unrelated individuals. While seemingly similar to the City of Kent’s two unrelated individual restriction, in Bowling Green, occupants of single family homes in certain zoned districts were restricted to occupants who are not related to three individuals, where related individuals could reside in the homes without limit.

{¶51} In *Yoder*, however, the purpose of the zoning district that implemented the restriction was to *control density*. The restriction essentially had no bearing on density since there was no impact on density regardless of whether five related or five unrelated individuals resided in a single family home. As a result, the *Yoder* court ruled:

[T]he dwelling limit is impermissibly arbitrary, oppressive, and untailored * * * [because] the limit applies unequally, is under-

inclusive, over-inclusive * * *. Within the regulations, the City claims to be effectuating a government interest in limiting population density. * * * But the City's dwelling limit only focuses on the type of relationship between those living together in a home, and as such, is both over- and under-inclusive with respect to either of these interests.

Yoder at 4.

{¶52} Here, the City of Kent's Code states that the purpose of the R-3 zoning district is "to encourage single family residential development at high densities in areas of existing development of such density, and thereby providing a more orderly and efficient extension of public facilities." Kent Codified Ordinances 1103.11(a). The application of the restriction in the *Yoder* case was arbitrary in its application for the purpose of controlling density. The City of Kent's restriction is consistent with limiting and allocating locations for specific property uses. The restriction is less concerned with the relationships of individual occupants of single family residences than the use of the property itself as a *single family residence*. While Rooming Houses are excluded from R-3 zoning districts without a certificate, they are permitted with CDD approval in R-4, R-C, C-R, IC-R, and C-D zoned districts. The City of Kent's restriction encourages property development of a distinct type of use within the R-3 area to facilitate public facilities, which is different than the Bowling Green's restriction which attempted to merely constrain population density, by placing a limit that had no actual impact on the population density. For this reason, *Yoder* is not analogous to the case before this Court.

{¶53} Further, it is well-settled law that zoning restrictions that limit unrelated individuals residing within single family dwellings are constitutional. *Village of Belle Terre v. Borass*, 416 U.S. 1, at 7. Further, the Ohio cases that discuss single family home restrictions and their constitutionality are concerned with individuals that constitute a

family or a family unit. A “family unit, which performs the social function of child-rearing, regardless of its relationship or composition or whether it includes foster children as well as natural children, is constitutionally protected against governmental intrusion not supported by a compelling governmental interest.” *Saunders v. Clark County Zoning Dept.*, 66 Ohio St.2d 259, 263, citing *Smith v. Organization of Foster Families* (1977), 431 U.S. 816, 844-845.

{¶54} Here, there is no taking, and there is no infringement on a fundamental right, nor is there an intrusion into the dynamics or compositional makeup of Havel’s family. Havel is free to rent to more than two unrelated individuals in one of the alternative permitted districts within the City of Kent.

{¶55} Kent BZA’s second assignment of error is with merit.

{¶56} For the foregoing reasons, this case is reversed and remanded to the Portage County Court of Common Pleas for a proceeding consistent with this Court’s opinion.

MATT LYNCH, J.,

JOHN J. EKLUND, J.,

concur.