

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

KAELORR, LLC d.b.a. Liberty Tax Service, :

Plaintiff-Appellant, :

CASE NO. CA2012-03-058

- vs -

OPINION
10/22/2012

WEST CHESTER TOWNSHIP BOARD OF :
ZONING APPEALS, et al., :

Defendants-Appellees. :

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2011-01-0150

The Drew Law Firm Co., LPA, Anthony G. Covatta, Joel M. Frederic, One West Fourth Street, Suite 2400, Cincinnati, Ohio 45202, for plaintiff-appellant

Frost Brown Todd, Scott D. Phillips, 9277 Centre Pointe Drive, Suite 300, West Chester, Ohio 45069, for defendants-appellees, West Chester Township Board of Zoning Appeals and West Chester Township Board of Trustees

PIPER, J.

{¶ 1} Plaintiff-appellant, Kaelorr, LLC d.b.a. Liberty Tax Service (Liberty Tax), appeals a decision of the Butler County Court of Common Pleas upholding a decision of defendant-appellee, the West Chester Township Board of Zoning Appeals (BZA), after an administrative appeal.

{¶ 2} Liberty Tax is an income tax preparation and filing service, located in West Chester, Ohio. In January 2010, Liberty Tax received a "Zoning Violation Notice" from the West Chester Community Development Department for unauthorized noncompliant commercial special method advertising. Liberty Tax was cited because it employed a woman, who was dressed as the Statue of Liberty (Lady Liberty), to stand near the road to wave at passerbys in order to attract customers near the West Chester Shopping Center where Liberty Tax does business. Lady Liberty was a signage violation because she was not set back a minimum of 15 feet from the street right-of-way, was of a portable nature rather than affixed to the ground as the ordinance required, exceeded the size limit, and was used longer than special signage is permitted to be used.

{¶ 3} Liberty Tax did not appeal the violation notice, but instead, applied for a zoning variance. The BZA advertised and held a public hearing on the matter, during which time it heard testimony from Liberty Tax's owner and other interested parties. The BZA denied Liberty Tax's request for a variance after finding that, among other reasons, a variance would be contrary to enforcement actions taken in the past to control nuisance signage in the community.

{¶ 4} Liberty Tax then filed a complaint and notice of administrative appeal in the common pleas court. Within the complaint, Liberty Tax requested a declaratory judgment against the BZA declaring that Lady Liberty was not a sign, and that the BZA's actions were unconstitutional pursuant to the First and Fourteenth Amendments of the United States Constitution. The BZA moved the common pleas court to dismiss, or in the alternative, bifurcate the trial. The common pleas court held a hearing, at which time, both parties made oral arguments.

{¶ 5} In a February 2012 entry, the common pleas court issued a decision bifurcating the administrative appeal issue from the declaratory judgment action. The court then entered

judgment in favor of the BZA on the administrative appeal. Liberty Tax now appeals the common pleas court's decision, raising the following assignments of error. For ease of discussion, we will discuss Liberty Tax's assignments of error out of order.

{¶ 6} Assignment of Error No. 1:

{¶ 7} THE TRIAL COURT ERRED IN UPHOLDING THE BOARD'S DECISION WHEN BZA FAILED TO EITHER ANALYZE OR APPLY THE SECTION 9.91 STATUTORY DEFINITION OF "SIGN" IN DETERMINING THAT A PERSON DRESSED AS THE STATUE OF LIBERTY CONSTITUTED A "SIGN."

{¶ 8} In Liberty Tax's first assignment of error, it challenges the common pleas court's decision to uphold the BZA's denial of the requested variance. While Liberty Tax couches its argument in regard to whether the BZA properly analyzed whether Lady Liberty constituted a sign, Liberty Tax chose to ask the BZA for a variance, therefore, inherently accepting the premise that Lady Liberty constituted a sign for purposes of obtaining the variance. Therefore, and despite any discussion by the BZA during deliberations to the contrary, the BZA was not asked to determine whether Lady Liberty was or was not a sign. Our review regarding the common pleas court's decision upholding the BZA's decision to deny the variance is constrained to the legal question of whether the statutory administrative appeal process proceeded correctly.

{¶ 9} In reviewing an administrative body's decision, a court of common pleas reviews the evidence within the record and then determines whether the agency's decision is "unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence." R.C. 2506.04. "A court is bound by the nature of administrative proceedings to presume that the decision of the administrative agency is reasonable and valid." *Community Concerned Citizens, Inc. v. Union Twp. Bd. of Zoning Appeals*, 66 Ohio St.3d 452, 456 (1993). Additionally, on review, a court

may not substitute its judgment for that of the administrative board. *Id.*

{¶ 10} The standard of review to be applied by the court of appeals in an R.C. 2506.04 appeal is "*more limited in scope.*" *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147 (2000). (Emphasis in original.) While the common pleas court examines the evidence, examining or weighing evidence "is not the charge of the appellate court." *Id.* Instead, in reviewing an administrative appeal, this court is limited to questions of law and must affirm the common pleas court's decision unless the lower court abused its discretion by finding that an administrative board's decision was supported by a preponderance of reliable, probative, and substantial evidence. *Id.*; *see also Abdalla Ent. v. Liberty Twp. Bd. of Trustees*, 196 Ohio App.3d 204, 2011-Ohio-5085, ¶ 18 (12th Dist.).

{¶ 11} According to West Chester Township Zoning Resolution Section 8.053,

Standards for Variances. The Practical Difficulties test as set forth in *Duncan v. Middlefield* (1986), 23 Ohio St.3d 83, 491 N.E.2d 692, or as this standard may be amended by the Ohio Supreme Court or the state legislature, will apply to determine if an area variance shall be granted. The factors to be considered and weighed in determining whether a property owner seeking an area variance has encountered practical difficulties in the use of the property include, but are not limited to:

a) Whether the property in question will yield a reasonable return or whether there can be any beneficial use of the property without a variance.

b) Whether the variance is substantial.

c) Whether the essential character of the neighborhood would be substantially altered or whether adjoining properties would suffer a substantial detriment as a result of the variance.

d) Whether the variance would adversely affect the delivery of governmental services.

e) Whether the property owner purchased the property with knowledge of the zoning restriction.

f) Whether the property owner's predicament feasibly can be obviated through some method other than a variance.

g) Whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting the variance.

After the public hearing on the issue, the BZA determined that Liberty Tax could not demonstrate practical difficulties warranting a variance from the zoning resolution. The common pleas court upheld the BZA's decision after finding that the BZA's decision was supported by a preponderance of substantial, reliable, and probative evidence.

{¶ 12} The common pleas court considered evidence and testimony on the record related to each of the seven factors regarding practical difficulties. First, the record contained evidence that Liberty Tax could yield a reasonable return without the requested variance based on the fact that other successful commercial businesses within the same vicinity operated without a human sign.

{¶ 13} Second, the requested general variance permitting Liberty Tax to use Lady Liberty would have required the BZA to actually grant several different variances because Lady Liberty violates multiple sections of the zoning ordinance. These violations include: allowing the sign on property not owned by Liberty Tax, employing moving parts to attract attention, not affixing the sign to the ground, average size larger than 16 square feet, a possible height higher than six feet from grade, locations closer than 15 feet from the right-of-way, and advertising longer than the maximum six-week time-frame for special advertising, as Liberty Tax was requesting the variance from January until April 15. Therefore, these several variances made the more general variance to permit Lady Liberty a significant one.

{¶ 14} Third, the variance would alter the character of the neighborhood. The record indicated that Lady Liberty created distractions for passing motorists and also detracted from the surrounding commercial signage utilized by other commercial businesses. The BZA discussed that drivers would be distracted by Lady Liberty waiving, and that the distractions would be dangerous given the close proximity of Lady Liberty to the busy roadway.

{¶ 15} Fourth, Lady Liberty would further tax West Chester's services by creating a higher risk of traffic accidents and by requiring significant enforcement oversight to ensure that Lady Liberty does not encroach on the right-of-way. The record indicates that the zoning board would have been forced to spend significant time regulating Lady Liberty by inspecting her to make sure that she was not causing dangerous conditions by being too close to the public roadway, especially because there are not any sidewalks between the shopping center and the busy road that it abuts. Also, Liberty Tax is located in a busy shopping plaza, and the surrounding traffic is often heavy, causing dangerous driving conditions if drivers become distracted.

{¶ 16} Fifth, Liberty Tax is not the owner of the property, but rather the lessor, and therefore did not *purchase* the land knowing about the ordinance. However, as lessor, Liberty Tax would have been fully aware of the signage ordinance when it agreed to lease the property from the owner.

{¶ 17} Sixth, Liberty Tax could utilize more traditional and non-violating signage, which is permitted by the zoning ordinance. The record contained evidence that Liberty Tax could affix a non-human sign to the ground, advertising its services, without violating the zoning ordinances.

{¶ 18} Seventh, permitting Lady Liberty would be inconsistent with the intent of the Zoning Resolution to allow only more subdued temporary signage in the commercial area. The record indicates that part of the reason for the zoning ordinance regarding signage is to ensure that the commercial districts maintain a "consistent and appropriate looking" appearance. The BZA determined that it would be difficult to permit Lady Liberty without also having to permit other businesses to have distracting and unattractive advertising, especially after the BZA had worked so diligently to remove nuisance signage from the commercial areas of the township.

{¶ 19} After reviewing the record, the common pleas court correctly found that that the BZA's decision was supported by a preponderance of reliable, probative, and substantial evidence. Therefore, Liberty Tax's first assignment of error is overruled.

{¶ 20} Assignment of Error No. 3:

{¶ 21} IF A PERSON DRESSED AS THE STATUE OF LIBERTY CONSTITUTES A SIGN, THEN THE TRIAL COURT ABUSED ITS DISCRETION IN RULING ON EVIDENTIARY ISSUES AND FAILING TO ADDRESS LIBERTY TAX'S UNCONSTITUTIONAL-AS-APPLIED AND DUE-PROCESS ARGUMENTS WITH RESPECT TO ITS ADMINISTRATIVE APPEAL.

{¶ 22} In its third assignment of error, Liberty Tax argues that the common pleas court erred by not accepting additional evidence before issuing its decision, and that the common pleas court should not have bifurcated the proceedings into two separate actions: (1) a challenge to the denial of the variance on administrative appeal, and (2) the declaratory judgment action regarding whether Lady Liberty constituted a sign and the related constitutional challenges.

{¶ 23} Regarding the common pleas court not taking additional evidence, the record is clear that Liberty Tax did not request the court to do as such as is required by R.C. 2506.03, which states,

(A) The hearing of an appeal taken in relation to a final order, adjudication, or decision covered by division (A) of section 2506.01 of the Revised Code shall proceed as in the trial of a civil action, but the court shall be confined to the transcript filed under section 2506.02 of the Revised Code unless it appears, on the face of that transcript or by affidavit filed by the appellant, that one of the following applies:

(1) The transcript does not contain a report of all evidence admitted or proffered by the appellant.

(2) The appellant was not permitted to appear and be heard in person, or by the appellant's attorney, in opposition to the final order, adjudication, or decision, and to do any of the following:

- (a) Present the appellant's position, arguments, and contentions;
 - (b) Offer and examine witnesses and present evidence in support;
 - (c) Cross-examine witnesses purporting to refute the appellant's position, arguments, and contentions;
 - (d) Offer evidence to refute evidence and testimony offered in opposition to the appellant's position, arguments, and contentions;
 - (e) Proffer any such evidence into the record, if the admission of it is denied by the officer or body appealed from.
- (3) The testimony adduced was not given under oath.
- (4) The appellant was unable to present evidence by reason of a lack of the power of subpoena by the officer or body appealed from, or the refusal, after request, of that officer or body to afford the appellant opportunity to use the power of subpoena when possessed by the officer or body.
- (5) The officer or body failed to file with the transcript conclusions of fact supporting the final order, adjudication, or decision.
- (B) If any circumstance described in divisions (A)(1) to (5) of this section applies, the court shall hear the appeal upon the transcript and additional evidence as may be introduced by any party. At the hearing, any party may call, as if on cross-examination, any witness who previously gave testimony in opposition to that party.

Liberty Tax did not allege that the transcript did not contain a report of all of the pertinent evidence, that it had not been permitted to appear, or any other possible circumstances listed in R.C. 2506.03. Therefore, the common pleas court did not err by basing its decision on a closed record, or by not taking additional evidence before administering its opinion.

{¶ 24} Second, and specific to the declaratory action, the trial court correctly bifurcated the proceedings. The record indicates that Liberty Tax included a request for declaratory judgment within its complaint and administrative appeal. While the issues within the R.C. 2506.04 administrative appeal undoubtedly overlap with the issues set forth in the R.C. Chapter 2721 declaratory judgment action, the Ohio Supreme Court has recognized the

distinct difference between the two processes, and that one's administrative appeal must first be exhausted before the court can consider a declaratory judgment action.

[I]n Ohio, the constitutionality of a zoning ordinance may be attacked in two ways. An appeal from an administrative zoning decision can be taken pursuant to R.C. Chapter 2506. In addition, or in the alternative, a declaratory judgment action pursuant to R.C. Chapter 2721 can be pursued. A short examination of the two actions will reveal the differences between them, including the significant difference that denial of a specific proposed purpose is pivotal to the ripeness determination in an R.C. Chapter 2506 proceeding but not to the ripeness determination in a declaratory judgment action pursuant to R.C. Chapter 2721.

* * *

[I]n *Driscoll v. Austintown Associates* (1975), 42 Ohio St.2d 263, 71 O.O.2d 247, 328 N.E.2d 395, we dispelled any doubt that a declaratory judgment action could be used to challenge the constitutionality of a zoning ordinance. We held that in light of Civ.R. 57 (which provides in part that "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate"), a declaratory judgment action, filed pursuant to R.C. Chapter 2721, is available as an alternative remedy for such attacks.

* * *

Although both an R.C. Chapter 2506 action and an R.C. Chapter 2721 declaratory judgment action seek the same result-elimination of an existing zoning regulation which precludes a proposed use of the property-any similarity between the two actions ends there.

The R.C. Chapter 2506 appeal is a judicial review of a final administrative decision denying a variance to a property owner. The challenge is that a prohibition against a specific proposed use is unconstitutional; and the task of the trial court is to determine whether the prohibition against the specific proposed use has any reasonable relationship to the legitimate exercise of police power by the municipality. * * * Thus, the determination turns on the specific proposed use of the property.

In contrast, a declaratory judgment action challenges the constitutionality of an existing zoning ordinance. The action does not call into issue the denial of a variance, even though, as discussed subsequently, exhaustion of the administrative variance procedure is usually required prior to initiating a declaratory judgment action. * * * The overall constitutionality of a zoning

ordinance as applied to a particular parcel of property is the central question. It may, but need not, involve a question as to the constitutionality of a prohibition against a specific proposed use. The declaratory judgment action is independent from the administrative proceedings and it is not a review of a final administrative order.

The distinction between the two actions is important because in an R.C. Chapter 2506 appeal, the trial court need not make an objective determination of the overall constitutionality of a zoning ordinance. It will view the constitutional issue only in light of the proposed specific use. If the court finds the restriction against the proposed use valid, its inquiry ends. In making such a limited determination, it is possible that the existing zoning could be unconstitutional, but the zoning would not be declared unconstitutional because the prohibition against the specific proposed use is valid. * * *

A declaratory judgment action lies when a party challenges a zoning ordinance as it applies to a specific parcel of property to proscribe the owner's proposed use of the property. An actual controversy exists when persons aver that their rights, status or other legal relations have been affected by an allegedly invalid ordinance.

Accordingly, we hold that a prerequisite to a determination that an actual controversy exists in a declaratory judgment action is a final decision concerning the application of the zoning regulation to the specific property in question. Once a controversy is established, jurisdiction is successfully invoked and the issue of constitutionality becomes ripe for determination.

Karches v. City of Cincinnati, 38 Ohio St.3d 12, 15-16 (1988). (Internal citations omitted.)

{¶ 25} Unlike a case where a party exhausts its R.C. 2506.04 administrative appeal without addressing a constitutional challenge, the record is clear that Liberty Tax did raise its challenge to the constitutionality of the ordinance in its complaint. By doing so, Liberty Tax asked the common pleas court to declare that Lady Liberty was not a sign, and that any ordinance denying the use of Lady Liberty is a violation of Liberty Tax's right to free commercial speech as well as a violation of due process. Nor is this a case where Liberty Tax hoped to forum shop or bypass the administrative appellate process by filing a declaratory judgment action in the common pleas court. See *Champaign County Nursing Home v. Ohio*

State Dept. of Human Services, 10th Dist.Nos. 98AP-255, 00AP-9, 2003-Ohio-1706 (affirming dismissal of nursing home's declaratory judgment action on summary judgment because nursing home was pursuing an administrative appeal in the same common pleas court, but with a different judge); and *Grybosky v. Ohio Civil Rights Comm.*, 11th Dist. No. 2010-A-0047, 2011-Ohio-6843 (affirming dismissal of declaratory action where appellants had an adequate legal remedy through an administrative process and were only hoping to bypass the administrative appellate process in lieu of a more speedy declaratory action).

{¶ 26} Liberty Tax chose to proceed on the constitutional challenge and signage issue as a request for declaratory judgment, and therefore cannot now argue that the common pleas court erred by bifurcating the proceedings. In fact, the trial court's proper bifurcation will now allow Liberty Tax to pursue the signage issue, as well as its constitutional challenge. Both parties will now be afforded the opportunities for discovery as well as the chance to present evidence to the common pleas court, which they were prohibited from doing in a closed-record appeal pursuant to R.C. 2506.03. Once the common pleas court made a determination as to Liberty Tax's administrative appeal, the declaratory judgment action became ripe for review. Therefore, Liberty Tax's third assignment of error is overruled.

{¶ 27} Assignment of Error No. 2:

{¶ 28} NOTWITHSTANDING BZA'S FAILURE TO CONSIDER SECTION 9.91, A PERSON DRESSED AS THE STATUE OF LIBERTY DOES NOT CONSTITUTE A SIGN THEREUNDER IN ANY EVENT.

{¶ 29} In its second assignment of error, Liberty Tax asks this court to determine whether Lady Liberty constitutes a sign regulated by the West Chester signage ordinance. However, and as we have discussed under Liberty Tax's first assignment of error, Liberty Tax never appealed the original notice of a zoning violation. Instead, it chose to cease and desist the use of Lady Liberty as an advertising tool and to then seek a variance. Seeking a variance

from the signage ordinance is an inherent admission that Lady Liberty is a sign, at least for the purposes of the administrative appeal process. However, and as discussed within Liberty Tax's third assignment of error, the common pleas court will now proceed on the declaratory judgment action, during which process both parties may address the signage and related constitutional issues. However, this appeal is not the proper vehicle for addressing whether Lady Liberty constitutes a sign, as that issue was not before the BZA or common pleas court. Any discussion or decision regarding Lady Liberty as a sign during the BZA proceedings or by the common pleas court was superfluous because the only issue for decision and review was whether Liberty Tax was entitled to a variance. Therefore, we find Liberty Tax's second assignment of error moot.

{¶ 30} Judgment affirmed.

RINGLAND, P.J., and YOUNG, J., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.