

**IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO
CIVIL DIVISION**

Leah Turner, et al., :
Appellants, : Case No. 21CV3635
v. : Judge Mark A. Serrott
City of Bexley Board of Zoning and :
Planning, et al., :
Appellees. :

**DECISION AND ORDER REVERSING AND REMANDING THE DECISION OF
BEXLEY CITY COUNCIL**

I. Introduction

Pursuant to R.C. 2506.01, this case is before the Court on Appellants’ Leah and Jesse Turner (“Appellants”) administrative appeal from Appellees’ City of Bexley Board of Zoning and Planning (“BZAP”) and Bexley City Council (“City Council”) decisions granting the conditional uses requested by Appellee The Community Builders (“TCB”). The matter is fully briefed and ready for decision. For the reasons that follow, this Court **REVERSES AND REMANDS** the decision of City Council rendered on May 11, 2021.

II. Background

On January 26, 2021, TCB applied for conditional uses that would allow dwelling units on the first and upper floors of a building located in a commercially-zoned property in the Appellee City of Bexley (“Bexley”). The development would create twenty-seven (27) apartment units with a total of fifty-eight (58) bedrooms with thirty (30) parking spaces in an area where parking is sparse. The new development would have no commercial use despite the current zoning for the property as Commercial Service District. The Appellants are Bexley residents who oppose the conditional use and live nearby the property.

On January 28, 2021, a hearing was held before BZAP on TCB's application. About fifteen (15) residents from the area nearby the property attended the hearing and opposed the development as proposed. The residents cited concerns such as traffic, parking, density, and safety. BZAP tabled the motion and reheard the matter on a later date, which occurred on February 25, 2021. All residents appearing at the second hearing again opposed the development. After hearing all arguments and other evidence, BZAP approved TCB's conditional use application.

Pursuant to Bexley City Code 1226.19, Appellants timely appealed BZAP's decision to City Council. Instead of hearing the appeal, however, City Council recused itself because of "the actual or perceived conflicts of interest of a majority of the members of [City] Council."¹ Beyond conflicts of interest, no further explanation was given. Apparently, some members of City Council believed there was a conflict of interest because a partner of TCB's in the project, "CIC," was created by City Council.² As a result, no hearing ever occurred on Appellant's appeal of BZAP's decision to City Council. Instead, on May 11, 2021, City Council determined that "[t]he BZAP decision is the final decision of the City" and "[t]his decision of [City] Council is the final determination made by the City [Bexley]."³ On June 6, 2021, Appellants filed their appeal before this Court.

III. **Standard of Review**

R.C. 2506.01 permits administrative appeals, which states "every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department, or other division of any political subdivision of the state may be reviewed

¹ Record of Proceedings, July 7, 2021, p. 234 (Determination on Appeal, May 11, 2021).

² See Appellee's Brief (TCB), September 30, 2021, p. 15.

³ Record of Proceedings, July 7, 2021, p. 234 (Determination on Appeal, May 11, 2021).

by the court of common pleas of the county in which the principal office of the political subdivision is located.”

The standard of review for administrative appeals brought under R.C. 2506.01 is found in R.C. 2506.04, which provides:

[T]he 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.

“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, Ltd. v. Planning & Zoning Comm'n of Dublin*, 2009-Ohio-2230, ¶16.

IV. **Law and Analysis**

Appellants raise four (4) arguments why this Court should reverse the decision of BZAP and City Council. The first three (3) arguments address substantive deficiencies of BZAP’s review under Bexley City Code 1226.12, whereas the fourth argument addresses a procedural issue raised by City Council’s failure to hear Appellant’s appeal from BZAP under Bexley City Code 1226.19. Bexley City Code 1226.12 governs conditional uses. BZAP may only approve conditional uses if the applicant proves all of the (a) through (h) factors. After BZAP issues a decision under Bexley City Code 1226.12, the applicant or a Bexley property owner that is affected by the decision may appeal to City Council under Bexley City Code 1226.19.

Because the Court's determination on the procedural issue requires reversal and remand, the Court need not rule on the substantive issues raised by Appellants under Bexley City Code 1226.12 since City Council must first comply with Bexley City Code 1226.19. The Court ultimately finds that City Council's failure to conduct a hearing on the appeal was "illegal, arbitrary, capricious, [and] unreasonable" and "unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record," which is required by the standard of review under R.C. 2506.04. Specifically, City Council's decision not to conduct a hearing is (a) not permitted by Bexley City Code 1226.19 because 1226.19(d) only provides timing modifications, not the authority to dispense with a hearing and (b) violative of Appellants' due process rights.

a. City Council's Recusal and Failure to Hold a Hearing Under Bexley City Code 1226.19 Was Illegal Because Only Modifications to the Timing of the Hearing Are Permitted

Appellants raise a procedural issue regarding City Council's recusal and failure to conduct a hearing on the appeal pursuant to Bexley City Code 1226.19. Appellants contend City Council neglected its duty under the ordinance to hear the appeal and, as a result, never considered the substantive (a) through (h) factors set forth in Bexley City Code 1226.12. Thus, this Court is left to guess at what factors City Council may have or may not have considered as important.

In contrast, TCB, BZAP, Bexley, and City Council (collectively, "Appellees"), argue that the recusal was warranted and authorized by Bexley City Code 1226.19(d)(3). Specifically, Appellees argue that Bexley City Code 1226.19(d)(3) permitted it to decline to hear the appeal. Bexley City Code 1226.19(c) and (d) in pertinent part provides the following verbatim:

(c) Upon receipt of the filing of a Notice of Appeal, the Clerk of City Council shall notify the Clerk of the Board from which an appeal has been taken who shall file with the Clerk of Council the record of the proceedings, all relevant background or other information that was before or taken into consideration by the Board in making the order, adjudication, or decision being appealed within fourteen (14) calendar days of receiving the Notice of Appeal from the Clerk of Council.

(d) Bexley City Council shall examine the record of decision and hear oral argument by the parties within thirty (30) days of receiving the Notice of Appeal, unless the following apply:

- (1) If Bexley City Council is in summer recess at the time of receiving Notice of Appeal, Council shall hear argument within sixty (60) calendar days of receiving the Notice of Appeal.
- (2) If there is an agreement between the appellant, the appellee, and the City Attorney, an extension may be granted.
- (3) Other good cause as determined by Bexley City Council.
 - i. The Plain Language and Contextual Reading of 1226.19(d) Do Not Provide the Authority to Dispense With a Hearing

After this Court's review of the parties' arguments and ordinance, Bexley City Code 1226.19 establishes that Appellees' reliance on 1226.19(d)(3) for cancelling the hearing is unwarranted and misplaced. Bexley City Code 1226.19 mandates a hearing; the three subsections of Bexley City Code 1226.19(d) are temporal modifications that permit extensions beyond the thirty (30) day base requirement. As the following analysis shows, the section is limited to extending the time to conduct the appeal hearing, not to dispensing with the hearing altogether.

Bexley City Code 1226.19(d) mandates a hearing within thirty (30) calendar days unless one of the three listed exceptions apply. The first is if City Council is in summer recess. The second is if the parties agree. The third is for other good cause determined by City Council. The third exception is limited to extending the thirty (30) day mandatory hearing time requirement and has nothing to do with dispensing with the

hearing altogether. The plain language, along with reading 1226.19(d)(3) in context with 1226.19(d)(1) and 1226.19(d)(2), establishes 1226.19(d)(3) is limited to extending the mandatory thirty (30) day hearing requirement.

In this case, City Council failed in its legal obligation to hear the appeal and issue the required findings under Bexley City Code 1226.19(d) and 1226.19(l).⁴ Nothing in the ordinance permits recusal or provides for an alternative to hearing the appeal.⁵

ii. The Statutory Construction Principle of Eiusdem Generis Compels This Court's Decision

Further, the statutory construction principle known as “ejusdem generis” supports the Court’s interpretation of the ordinance. The ejusdem generis rule provides that when a statute or ordinance first uses terms or conditions that are confined to a certain class or have certain characteristics, 1226.19(d)(1) and 1226.19(d)(2), then subsequent terms are limited to the preceding limited and confined terms, i.e. 1226.19(d)(3). *See State v. Aspell*, 10 Ohio St.2d 1 (1967); *see also Federer v. Ohio Department of Natural Resources*, 2015-Ohio-5368 (this Court’s decision that was affirmed by the Tenth District Court of Appeals).

Applying the above rule to the ordinance issue herein, the 1226.19(d) section of the ordinance is undisputedly limited to extending the thirty (30) day period and 1226.19(d)(1) and 1226.19(d)(2) are specific examples of reasons to extend the thirty (30) days. A fortiori, because 1226.19(d)(1) and 1226.19(d)(2) are limited to reasons

⁴ Bexley City Code 1226.19(l) requires that City Council “shall issue written findings of fact and conclusions of law within thirty (30) calendar days after the hearing.”

⁵ The Court recognizes the dilemma of the alleged conflicts of interest, but is unaware of any code or charter provisions that require recusals on certain matters before City Council or an alternative process if a member(s) recuses. Regardless, the Court notes that City Council has a mandatory duty to hear the appeal.

extending the thirty (30) day period; 1226.19(d)(3) is also limited to extending the thirty (30) day hearing period.

Under the doctrine of ejusdem generis, 1226.19(d)(3) coming after 1226.19(d)(1) and 1226.19(d)(2) is limited to the same class or characteristics which is extending the thirty (30) day period. Neither 1226.19(d)(1) nor 1226.19(d)(2) deals with cancelling a hearing or refusing to conduct a hearing. Therefore, any reasonable construction of the plain terms used in 1226.19(d)(3) is limited to extending the thirty (30) day period.

Thus, City Council is free to extend the thirty (30) days for good cause shown, but not to abdicate its requirement to conduct a hearing. Had City Council intended Bexley City Code 1226.19 to allow recusal or to simply not conduct a hearing it could have enacted a provision expressly dealing with that situation. Instead, Bexley City Code 1226.19(d)(3) is limited to extending the thirty (30) day period.

b. City Council's Failure to Hold A Hearing Deprived Appellants of Their Due Process Rights

Moreover, when a legislative body, such as a city council, provides for an appeal to the council in zoning cases, due process rights attach to the party seeking the appeal. The Appellant is entitled to notice, the right to be heard, and fair consideration of the appeal. *See Hoegler v. Planning and Zoning Comm'n of City of Highland Heights, 1976 Ohio App. Lexis 7250.* That court noted that when ordinances provide for a hearing, the city gives "appellant a right to notice of and to participate in a public hearing on request for zoning variances." *Id.* The same rule applies to the conditional use at issue herein. The ordinance gave the Appellants the right to notice, a hearing, and the full plenary of the due process rights detailed in Bexley City Code 1226.19.

By recusing and refusing to conduct a hearing, City Council deprived Appellants of the rights under the ordinance and deprived them of their due process rights. Additionally, by failing to conduct a hearing and failing to issue findings of fact as required, this Court was deprived of the ability to conduct a meaningful review of the decision to grant the conditional use. Ultimately, these actions are “illegal, arbitrary, capricious, [and] unreasonable” and “unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record.”

V. Conclusion

For the aforementioned reasons, this Court **REVERSES** and **REMANDS** the decision of City Council as contrary to law. On **REMAND**, the Court **ORDERS** that City Council conduct an appeal hearing in strict compliance with Bexley City Code 1226.19 and that it render a decision with written findings as required by Bexley City Code 1226.19(l). Because the Court’s determination on the procedural issue under Bexley City Code 1226.19 causes reversal and remand, the substantive issues raised by Appellants under Bexley City Code 1226.12 are moot at this time. The Appellees shall be responsible for the costs of this appeal.

IT IS SO ORDERED.

Electronically Signed By:

JUDGE MARK A. SERROTT

Franklin County Court of Common Pleas

Date: 10-15-2021
Case Title: LEAH TURNER ET AL -VS- CITY OF BEXLEY BOARD OF ZONING AND PLANN ET AL
Case Number: 21CV003635
Type: DECISION

It Is So Ordered.



/s/ Judge Mark A. Serrott

Court Disposition

Case Number: 21CV003635

Case Style: LEAH TURNER ET AL -VS- CITY OF BEXLEY BOARD
OF ZONING AND PLANN ET AL

Case Terminated: 18 - Other Terminations