

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

LEAH TURNER,	:	
	:	Case No. 22CVF-878
Appellant,	:	
	:	JUDGE KIM BROWN
vs.	:	
	:	
CITY OF BEXLEY BOARD OF	:	
ZONING AND PLANNING, ET AL.,	:	
	:	
Appellees.	:	

**DECISION AND FINAL JUDGMENT
REVERSING JANUARY 11, 2022 DECISION OF
THE CITY OF BEXLEY, CITY COUNCIL**

I. INTRODUCTION

This is an administrative appeal from a January 11, 2022 decision by the City of Bexley, City Council (“City Council”). By that decision, City Council affirmed a February 25, 2021 decision by the City of Bexley Board of Zoning and Planning (the “Board”) to approve conditional-use requests by The Community Builders (the “Developer”) to build an apartment building (the “Proposed Development”) in an area zoned as Commercial Service District (“CS District”).

II. BACKGROUND

The Proposed Development would be located at 2300 East Livingston Avenue (the “Property”). The Property is located in Bexley, across the street from Columbus; it is presently used as a funeral home. Appellant Leah Turner owns property adjacent to the Property.

The Developer wants to raze the buildings now on the Property and build a 3-story, approximately 35,000-square-foot apartment building. Within its 27 proposed units, the Proposed Development would offer 1-, 2-, and 3-bedroom apartments (58 bedrooms in total).

The Proposed Development would not use the Property in a manner “permitted” under Bexley’s Zoning Code. *See* Bexley Code 1254.09 (establishing permitted and conditional uses for commercial/industrial districts). The Developer requested Board approval of two “conditional uses” for the Proposed Development: (1) “Dwelling units on first floor,” and (2) “Dwelling units above first floor.” *Id.*

After two hearings, the Board approved those requests. In turn, City Council declined to review the decision and instead “recused,” purporting to permit a direct appeal to this court. In that appeal, the court reversed and remanded for City Council’s consideration of the Board’s decision because no authority supported City Council’s recusal. *Turner v. Bexley Bd. of Zoning and Planning*, Franklin C.P. No. 21CV-3635 (October 15, 2021 Decision). On remand, City Council affirmed the Board’s decision. In relevant part, City Council concluded, without explanation, that the Proposed Development meets the intent of the CS District. It further found:

BCC 1254.09 specifically identifies as conditionally permitted both “dwelling units on the first floor” and “dwelling units above the first floor” in the CS District as intended and expressly provided by council in BCC 1254.09. There is no express restriction or prohibition in the BCC forbidding such conditional uses in the same building and none can be implied. (Emphasis sic.)

On February 9, 2022, Ms. Turner filed this appeal. She and the Developer filed merit briefs on May 4 and June 2, respectively. The Board, City Council, and the City of Bexley (collectively, “Bexley”) filed a combined merit brief on June 2. On June 9, Ms. Turner filed a reply brief.

On July 15, Ms. Turner filed a motion to stay the January 11, 2022 decision. The Developer and Bexley opposed that motion on July 28 and 29. On August 5, Ms. Turner filed a reply brief. On August 8, the court held a hearing on the motion. By agreement of the parties, the motion was held in abeyance until August 19, 2022.

The merits and the motion are ripe for decision.

III. STANDARD OF REVIEW

A common pleas court may find that a decision by the Board 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. “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.” *Id.*

IV. DISCUSSION

A. Applicable Zoning Code

Consistent with the intents established by statute, the City established “permitted” and “conditional” uses for each of its zoning districts. Bexley Zoning Code 1254.09 (commercial/institutional districts) and 1252.08 (residential districts). Importantly, “[u]ses specifically listed for one district but not included

in another are intentionally omitted from the latter.” Bexley Zoning Code 1254.09. For avoidance of doubt, that same provision further states: “Uses not listed as permitted or conditional * * * are prohibited.” *Id.*

The intent of the CS District follows:

This District * * * is an area of the City that is **presently developed for primarily quick-stop commercial service use**. While quality development standards are encouraged, it is acknowledged that **this district allows individual site off-street parking and convenient automobile access**. Its use **should be protected from conflicting activities** and incompatible scales. Where occurring at the border of the City, development standards should reflect those of adjacent community development practices where appropriate. Bexley Code 1254.05 (emphases added).

The following are the only uses “permitted,” without special approval, in the CS District:

- Retail sales to include general merchandise, food, apparel and accessories, home furnishings and equipment, drug stores, gift and specialty shops, sporting goods, office supplies and hardware.
- Retail services to include photographic studios, dry cleaners, barber and beauty shops, and small item repair services.
- Restaurant.
- Administrative, business, professional and similar office uses.
- Essential services.
- Accessory structures.

Bexley Code 1254.09. Relevant here, the following uses are “conditional,” upon special approval, in the CS District: (1) “Dwelling units on first floor,” and (2) “Dwelling units above first floor.” *Id.* A non-exhaustive list of other “conditional” uses includes: Funeral homes; retail sales providing a special convenience service; automobile repair; tavern; and outdoor facility in association with permitted use.

Id.

A conditional use shall be approved “if, and only if, it meets the intent of this Zoning Code and the **intent of the zoning district** in which the property is located, fits harmoniously with adjacent uses and structures **and complies with all other provisions of this Zoning Code.**” Bexley Code 1226.12 (emphasis added). An applicant must further prove such use “will not be detrimental to the public health, safety, or general welfare of the City or the neighborhood in which it is proposed.” *Id.* The Zoning Code “assumes that conditionally permitted uses are not appropriate.” *Id.*

B. Arguments on Appeal

Ms. Turner makes numerous arguments on appeal. Dispositive here, however, she contends the Proposed Development’s conditional uses were improperly approved because, by allowing a purely residential use in a commercial district, such conditional uses (1) violate Zoning Code and (2) fail to meet “the intent of the zoning district in which the property is located.” The court agrees on both points.

1. Uses Prohibited in the CS District

The Proposed Development is a “multifamily dwelling.” As such, it is prohibited in the CS District.

Uses permitted in the R-6 and R-12 districts are “intentionally omitted” from and “prohibited” in the CS District. Bexley Code 1254.09 (identifying commercial/industrial uses). In the R-6 district, “single-family dwellings” are permitted. Bexley Code 1252.08 (identifying residential uses). And in the R-12 district, “two-family dwellings,” “multifamily dwellings,” and “townhouses” are

permitted. *Id.*

“Dwelling” means any building or portion thereof designed or used exclusively as the residence or sleeping place of one or more persons, but not including a tent, cabin, trailer, or trailer coach, boarding or rooming house, hotel or motel. **A building consisting of one or more dwelling units, is defined as follows:**

- (a) Single-family dwelling, **consisting of one dwelling unit only;**
- (b) Two-family dwelling, **consisting of two dwelling units only;** and
- (c) Multifamily dwellings, **consisting of three or more dwelling units only.**

Bexley Code 1230.26 (emphasis added). “Multifamily dwelling” is elsewhere defined as “a building consisting of three or more dwelling units including condominiums, with various arrangements of entrances and party walls, other than a townhouse.” Bexley Code 1230.61. “ ‘Dwelling unit’ means **space within a building** designed for occupancy by one family for living purposes and having all of the following permanent components: cooking, bathing, and toilet facilities.” Bexley Code 1230.27 (emphasis added).

None of those terms are ambiguous. *See Banks v. Upper Arlington*, 10th Dist. No. 03AP-656, 2004-Ohio-3307, ¶ 33 (“there is no need to strictly construe an ordinance that has a definite meaning”).

The Proposed Development is a “dwelling” because it is a building that consists of “dwelling units only,” i.e., it has no commercial use. It is “multifamily” because it consists of 27 units, i.e., “three or more dwelling units only.” As such, the Proposed Development is prohibited in the CS District.

In its decision, City Council emphasized the Proposed Development consists of “dwelling units on first floor” and “dwelling units above first floor,” then stated there is no prohibition against such conditional uses in the same building. But there *are* prohibitions against buildings consisting of *only* dwelling units. Bexley Code 1254.09 (“intentionally omitting” and “prohibiting” R-6 and R-12 permitted uses).

Those provisions cannot be ignored. *See United Tel. Co. v. Limbach*, 71 Ohio St.3d 369, 372, 643 N.E.2d 1129 (1994) (“the interpretation of related and co-existing statutes must harmonize and give full application to all such statutes unless they are irreconcilable and in hopeless conflict”). As described above, the R-6 and R-12 prohibitions and the conditional-use provisions are capable of harmonization: Dwelling units are conditionally allowed on any floor in a building located in the CS District, so long as that building is not composed solely of dwelling units, i.e., it must have some commercial use. Because City Council failed to give full application to both the R-district prohibitions and the conditional-use provisions, its interpretation is “clearly in error.” *See Access Ohio, LLC v. City of Gahanna*, 10th Dist. No. 19AP-64, 2020-Ohio-2908, ¶ 16 (an interpretation of zoning code that is “clearly in error” deserves no deference).

In support of that erroneous position, Bexley notes that, when City Council amended the Zoning Code in 2016, the dwelling-unit conditional uses were newly added to the CS District. Thus, Bexley argues, those amendments were intended to allow “multifamily dwellings.” Plainly, some residential housing is contemplated in the CS District. But Bexley ignores that, at the same time the dwelling-unit conditional uses were added, City Council carried forward and

maintained the prohibitions against “dwellings” in the CS District. *Compare* Bexley Code 1254.08 current and prior versions (both intentionally omitting and prohibiting R-6 and R-12 permitted uses in the CS District).

For its part, the Developer argues: “It would be a strange reading of the Zoning Code to conclude that a two-family dwelling unit is prohibited in a CS district when Section 1254.09 conditionally allows ‘dwelling units on first floor’ and ‘dwelling units above first floor.’ “ Thus, the Developer concludes, the “legislative body” must have intended to prohibit single-family dwellings in the CS District (because it “intentionally omitted” and “prohibited” R-6 permitted uses) but intended “any proposal consisting of ‘dwelling units on first floor’ and/or ‘dwelling units above first floor’ be reviewed and approved on a case-by-case basis” (ignoring that R-12 permitted uses are “intentionally omitted” and “prohibited”).

It is not clear what the Developer meant by “two-family dwelling unit.” Assuming it meant “two-family dwelling,” the same analysis applies here as set forth above with respect to “multifamily dwellings.” Both the R-12 prohibition against two-family dwellings and the conditional uses have effect because, when read together, they allow in the CS District buildings with two dwelling units *and* some commercial use but prohibit buildings composed of “two dwelling units only.”

The court notes that, on the one hand, the R-12 district permits “multifamily dwellings not exceeding 4 dwelling units per structure” and that, on the other hand, the Proposed Development would constitute a multifamily dwelling exceeding 4 dwelling units per structure. To the extent it can be argued such dwellings are not “intentionally omitted” from the CS District by the omission of R-12 permitted

uses, they are still “prohibited.”

The Zoning Code generally prohibits dwellings exceeding 4 dwelling units per structure in *any* district (including the CS District) except when approved through planned unit development (“PUD”) procedures. Bexley Code 1252.07 (“Any development or redevelopment of a higher residential density than allowed under the development standards of [the R-12] district should generally be allowed only by planned unit development, as described in Chapter 1256, in appropriate locations and carefully designed to harmonize with nearby development.”). Moreover, “multifamily dwellings,” as defined by Bexley Code 1230.61, are not listed as permitted or conditional uses in the CS District; they are therefore “prohibited.” *See* Bexley Zoning Code 1254.09 (“Uses not listed as permitted or conditional * * * are prohibited.”). Those are prohibitions against “multifamily dwellings” on the scale of the Proposed Development in the CS District. They are harmonized with the conditional-use provisions in the same way as the R-district prohibitions.

2. Intent of the CS District

The intent of the CS District includes to be “protected from conflicting activities,” which would include prohibited uses. Because the Proposed Development is prohibited in the CS District, its proposed use does not meet the intent of the CS District.

City Council’s bare assertion (in its decision) that the Proposed Development meets the district’s intent provides no insight into its analysis. In maintaining that the Proposed Development meets the CS District’s intent, Bexley emphasizes the district’s statement of intent describes the area as “presently

developed for primarily quick-stop commercial service use” but does not require that use to be maintained.

But that interpretation is inconsistent with the CS District’s prohibition against “multifamily dwellings” and ignores that the district “should be protected from conflicting activities.” Bexley Code 1254.05. For similar reasons, the court also finds unavailing the Developer’s assertion that solely residential buildings are allowed in the CS District, so long as the area as a whole is developed for “primarily quick-stop commercial service use.”

V. DECISION

The January 11, 2022 decision by the City of Bexley, City Council is illegal, arbitrary, capricious, unreasonable, and unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Accordingly, the January 11, 2022 decision by the City of Bexley, City Council is **REVERSED**. This matter is **REMANDED** to City Council with instructions for City Council to deny the Developer’s conditional-use requests with respect to the Proposed Development.

This appeal is **DISMISSED WITH PREJUDICE**.

Ms. Turner’s motion to stay is **DENIED AS MOOT**. Costs taxed against appellees.

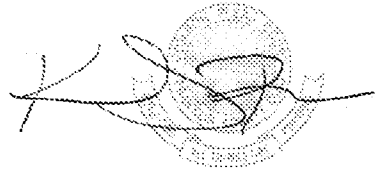
IT IS SO ORDERED.

*** * * THIS IS A FINAL, APPEALABLE ORDER * * ***

Franklin County Court of Common Pleas

Date: 08-17-2022
Case Title: LEAH TURNER -VS- CITY OF BEXLEY BOARD OF ZONING
AND PLANN ET AL
Case Number: 22CV000878
Type: JUDGMENT ENTRY

It Is So Ordered.



/s/ Judge Kim Brown

Court Disposition

Case Number: 22CV000878

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

Case Terminated: 10 - Magistrate

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 22CV0008782[REDACTED]980000
Document Title: 07-15-2022-MOTION TO STAY - PLAINTIFF:
LEAH TURNER
Disposition: MOTION IS MOOT