[Cite as *Jennings v. Xenia Twp. Bd. of Zoning Appeals*, 2009-Ohio-4402.]

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

CHRISTIE JENNINGS, et al. :

Plaintiffs-Appellants : C.A. CASE NO. 2008 CA 75

v. : T.C. NO. 2004 CV 0458

XENIA TOWNSHIP BOARD OF ZONING APPEALS : (Civil appeal from Common Pleas Court)

Defendant-Appellee :

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O P I N I O N

Rendered on the 28th day of August, 2009.

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DONOVAN, P.J.

{¶ 1} Plaintiff-appellants Christie M. Jennings and Craig V. Simonson [1] (hereinafter "Appellants") appeal a judgment of the Greene County Court of Common Pleas which adopted the decision of the magistrate which affirmed the decision of defendant-appellees Xenia Township Board of Zoning Appeals (hereinafter "BZA"), in which the BZA ultimately prohibited appellants from utilizing certain property in an area zoned specifically for agricultural use as a gravel pit.

I

{¶ 2} The relevant history of the property at issue, 1975 Clark Run Road in Xenia, Ohio, begins in 1947 with its owner, Una Harbison. Ms. Harbison owned this 62.1-acre lot from 1947 until 1975. During this period of time, Ms. Harbison permitted her brother, William Harbison, and Bob Denehy to extract sand and gravel from the property. The exact dates of sand and gravel extraction are points of contention. The record also shows that Ms. Harbison allowed her nephew, William Kent Harbison, to farm the property from 1959 until 1975.

{¶ 3} In 1975, Roger Richards obtained the property through a public auction; he owned it until his death in 2000. During this period of ownership, Mr. Rogers carried out a mining operation, extracting gravel from the property. The exact date that Mr. Richards initiated his operation is disputed between the parties; however, he first obtained a mining permit from the Ohio Department of Natural

[1] According to the Order Affirming Zoning Inspector's Cease and Desist Order, Mr. Simonson is a potential purchaser of the property in question, and he has a contingent executory purchase contract with Ms. Jennings as agent for the estate of Sherry Richards.

Resources in 1982.

{¶ 4} On June 26, 2000, Xenia Township Zoning Inspector, Leona Fletcher, issued a Notice of Zoning Violation to Mr. Richards, citing him with Non Permitted Use in an Agricultural District–Mineral Extraction. In response, Mr. Richards filed an appeal with the Board of Zoning Appeals requesting a conditional use permit for sand and gravel extraction in an agricultural district. Prior to the hearing on July 18, 2000, however, Mr. Richards passed away, leaving the property to his surviving spouse, Sherry Richards. A second hearing was scheduled for August 15, 2000. Before the second hearing, Ms. Richards withdrew her application for a conditional use permit and informed the Xenia Township Board of Trustees that she planned to pursue rezoning of the property for use as a gravel pit.

{¶ 5} In December 2000, Ms. Richards discussed with Rhonda Painter, the successor to Ms. Fletcher as the Xenia Township Zoning Inspector, the possibility of the property being issued a nonconforming use status. Deliberations continued for over two years, during which time, Ms. Richards passed away, leaving the property to her daughter, Appellant Christie Jennings. At the conclusion of these discussions, Ms. Painter determined that the property did not meet the qualifications "of grandfathering the nonconforming use," and she issued a second Cease and Desist Order on the property. Christie Jennings filed a Notice of Appeal on October 30, 2003.

{¶ 6} After extensive hearings, the BZA held the following:

{¶ 7} "The evidence presented at the hearing in support of upholding the Zoning Inspector's decision to issue the Final Determination Order of October 10,

2003 was both credible, and substantial, and to a preponderance of the evidence standard. The credible and substantial evidence was more than sufficient to find that the land was not being used as an active mining or mineral extraction operation at the time of the first zoning resolution's enactment on November 3, 1959. Because of this, the continued mining that is alleged to have been conducted after this time frame was not a pre-existing use and therefore would have been ineligible for nonconforming use status.

{¶ 8} "Alternatively, the evidence conclusively indicates that even if the mining operation was being conducted immediately prior to the 1959 zoning resolution's enactment, nevertheless several two year periods of time elapsed where there had been a voluntary discontinuance of mining operations, thus negating any non-conforming use status that may have been previously earned." (Order Affirming Zoning Inspector's Cease and Desist Order at 9-10.)

{¶ 9} Appellants appealed the decision of the BZA to the Common Pleas Court of Greene County. There, the court found that the testimony of the witnesses who lived in the area of Appellants' property supported the BZA's determination that "mining operations * * * had been discontinued by the owner for a period exceeding two years after 1959 and until it was sold to Roger Richards in 1975." (Decision and Entry at 3.) Thus, the trial court affirmed the decision of the BZA denying the property nonconforming use status, and appellants appealed the court's decision to us.

{¶ 10} In an opinion issued on May 11, 2007, we reversed the trial court's decision which held that sand and gravel extraction on appellants' property did not

constitute a nonconforming use under R.C. § 519.19, where such operations had been voluntarily discontinued by prior owners for a period exceeding two years between 1959 and 1975. *Jennings v. Xenia Township Board of Zoning Appeals*, Greene App. No. 07-CA-16, 2007-Ohio-2355 (hereinafter "*Jennings I*"). Relying on language in the 1959 and 1968 Xenia Township Zoning Resolution, we held that the trial court abused its discretion by classifying sand and gravel extraction as a nonconforming use because a 1959 Xenia Township Zoning Resolution, as well as a later 1968 resolution, established mining operations as a conditional use in agricultural districts, the type of zoning district in which appellants' property lies. *Id*. We reasoned the fact that the use was conditionally permitted prevented it from being a nonconforming use between the years of 1959 and 1975, and, thus, was excepted from the voluntary discontinuance provision in R.C. § 519.19. *Id*. We found that the proper inquiry for the trial court was to ascertain whether appellants were in compliance with the zoning conditions as set forth in the 1959 zoning resolution.

{¶ 11} After a motion for reconsideration was filed by appellees, we vacated our decision in *Jennings I* in an opinion issued on August 7, 2007. We reversed the trial court's decision again, and we found that the 1959 zoning resolution was enacted without expressly containing conditions or board approval requirements. Specifically, we held that the failure of the 1959 resolution to impose conditions on property owners who extracted sand and gravel from their land negated the section of the resolution which made mining in an agricultural district a conditional use subject to board approval. Thus, we found that sand and gravel extraction did not

become a conditional use in agricultural districts until the 1968 zoning resolution was passed.

{¶ 12} We also found that our rationale that a mining operation established as a conditional use could not be classified as a nonconforming use had been misapplied in *Jennings I*. Rather, we found that "when Xenia Township passed its resolution in 1968 [which made] sand and gravel extraction a conditional use in an agricultural district requiring approval by the board of appeals, mining operations that existed at the time the resolution was enacted became nonconforming uses and were subject to the limitations of R.C. 519.19." Thus, we held that the threshold issue to be addressed by the trial court on remand was whether mining operations on appellants' property were already in existence at the time that the 1968 resolution was passed. If the evidence established that mining operations were not being conducted when the 1968 resolution came into effect, gravel and sand extraction from the subject property would not be viewed as a nonconforming use, and would, therefore, be prohibited on said property absent the grant of a conditional use permit.

{¶ 13} On July 30, 2007, the magistrate affirmed the decision of the Xenia Township Board of Zoning Appeals, finding that the evidence established that there was no active mining operation on the subject property at the time that the 1968 zoning resolution passed. In a brief judgment entry, the trial court adopted the magistrate's decision on September 18, 2008. It is from this judgment that Jennings and Simonson appeal.

II

{¶ 14} Because they are interrelated, appellants' first and second assignments of error will be discussed together as follows:

{¶ 15} "THE TRIAL COURT ERRED BY APPLYING THE WRONG STANDARD OF REVIEW AND FAILING TO ADDRESS THE REMANDED QUESTION."

{¶ 16} "THE TRIAL COURT ERRED BY DETERMINING THAT THE XENIA TOWNSHIP BOARD OF ZONING APPEALS DECISION WAS SUPPORTED BY A PREPONDERANCE OF THE RELIABLE PROBATIVE EVIDENCE."

{¶ 17} In their first assignment, appellants contend that the trial court failed to apply the correct standard of review in regards to its affirmance of the BZA's decision denying nonconforming use status to the subject property located at 1975 Clark Run Road in Xenia, Ohio. Appellants additionally argue that the trial court abused its discretion by failing to perform a fresh review of the record. Appellants assert that the magistrate's decision issued on July 30, 2008, is "largely identical" to the decision initially issued by the trial court on December 29, 2005. Specifically, appellants assert that many portions of the 2008 magistrate's decision were copied from the 2005 trial court decision with only certain dates changed to reflect the directive we announced in our opinion issued August 7, 2007, in which we ordered the trial court to determine whether mining operations on appellants' property were already in existence at the time that the 1968 zoning resolution was passed. In further support of their allegation that the trial court did not perform a fresh analysis of the record, appellants point out that the 2008 decision, like the 2005 decision, did not perform any analysis of the multitude of expert testimony presented by

appellants which indicated an active mining site on the subject property in 1968 based on interpretations of aerial photographic evidence. In their second assignment of error, appellants argue that the trial court erred when it adopted the magistrate's decision because it was not supported by a preponderance of the substantial, reliable, and probative evidence.

{¶ 18} R.C. § 2506.04 governs administrative appeals from a board of zoning appeals decision. It provides, in pertinent part:

{¶ 19} "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 the instructions to enter an order, adjudication, or decision consistent with the findings or opinion of the court."

{¶ 20} "'A court of common pleas should not substitute its judgment for that of an administrative board, such as the [BZA], unless the court finds that there is not a preponderance of reliable, probative and substantial evidence to support the board's decision.' *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34. In determining whether the standard of review is correctly applied by the court of common pleas, the court of appeals has a limited function. *Id*., quoting, *Dudukovich v. Lorain Metro. Hous. Auth.* (1979), 58 Ohio St.2d 202, 207. The appellate court must affirm the court of common pleas unless it finds, 'as a matter of law, that the decision of the common pleas court is not supported by a preponderance of reliable, probative and

substantial evidence.' *Id*." *Tex-1, Inc. v. Dayton Bd. Of Zoning Appeals* (2001), 143 Ohio App.3d 636.

{¶ 21} Among the questions of law that we may review is whether the common pleas court abused its discretion. See, *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 148, 2000-Ohio-493. An abuse of discretion means more than an error of law or judgment; it implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, an appellate court may not merely substitute its judgment for that of the trial court. *Berk v. Mathews* (1990), 53 Ohio St.3d 161, 169. The role of the trial court is less limited, as it weighs the evidence and considers the "whole record" to see if "the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence." *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d at 147.

{¶ 22} Initially, we note that the magistrate's decision failed to correctly cite the proper standard of review to be used when conducting an administrative appeal from a decision issued by a board of zoning appeals. As previously stated, the correct standard of review requires the trial court to determine whether "there is *** a preponderance of reliable, probative and substantial evidence to support the board's decision." *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34. It is undisputed that in his decision issued on July 30, 2008, the magistrate misstated the standard of review. In particular, the magistrate stated that "this court must affirm the

Board's decision where there is in the record, *a preponderance of reliable probative evidence to support the decision* [of the BZA]." Absent from the standard recited by the magistrate is the modifier "substantial."

{¶ 23} This omission, standing alone, does not require reversal of the magistrate's decision. The standard of review requires that the trial court consider the "whole record" to see if "the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence." *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d at 147. As is apparent from the decision issued on July 30, 2008, the magistrate properly considered the "whole record" when he determined that the evidence demonstrated "by a preponderance of reliable probative evidence" that an active sand and gravel mine was not being operated at the property located at 1975 Clark Run Road when the 1968 zoning resolution was passed.

{¶ 24} In sum, the magistrate properly reviewed the record before he rendered his judgment which affirmed the BZA's decision. It is evident to us from the magistrate's written decision that he adequately considered the entire record before determining that the evidence supported a finding that an active sand and gravel mine was not being operated at the property located at 1975 Clark Run Road when the 1968 zoning resolution was passed.

{¶ 25} A review of the magistrate's July 30, 2008, decision established that the magistrate utilized key portions of the trial court's original decision issued on December 29, 2005, when crafting the analysis section in his decision. The

magistrate, however, did not simply copy the trial court's original decision. Rather, the magistrate drafted his own decision based on our directive which required him to review the evidence adduced during the hearings before the BZA in order to determine whether there was an active mining operation on the subject property at the time that the 1968 zoning resolution passed. While the magistrate used similar phrasing and language from the trial court's 2005 decision, we cannot find that the magistrate failed to perform a fresh review of the evidence before rendering judgment in favor of appellee. It should be noted that no new evidence was introduced for the magistrate to review on remand nor was any required to be adduced pursuant to our remand.

{¶ 26} During the course of the hearing before the Xenia BZA held over five days in early 2004, the BZA heard testimony from a multitude of witnesses. Appellants, in particular, called three expert witnesses to testify regarding the various aspects of certain aerial photographs taken of the subject property in successive years. Of specific importance to the current appeal are the aerial photographs taken in 1959, 1968, and 1973. All of appellants' experts testified that the aerial photographs depicted an active mining site that had not been abandoned at any point during the time frame in which the pictures were taken. In rebuttal, appellees called their own expert witness who essentially testified that the same photographs depicted an abandoned mine site that had not been actively used since prior to 1959. It is clear from his decision that the magistrate considered the testimony of both parties' experts when he affirmatively stated that "the record in this case indicates that both sides produced expert testimony offered

to support their respective positions."

{¶ 27} It is apparent, however, that the magistrate attached a great deal of significance to the testimony of Kent Harbison and his wife, Jane Harbison, who testified that no mining took place on the subject property between the years of 1959 and 1975, when they had farmed the property. The magistrate found the testimony of Kent Harbison and his wife to be persuasive, and his reliance on Kent Harbison's firsthand knowledge of the subject property during the specific time period at issue was a deciding factor in the magistrate's analysis. Moreover, appellants were unable to affirmatively state who, if anyone, was mining the property during the subject time period. The magistrate specifically found that although the appellants attempted to establish that a deceased individual named Robert Denehey operated a small mining site at the subject property at some point, no credible evidence was adduced which established that Denehey did so in 1968.

{¶ 28} Notwithstanding the conflicting testimony of the parties' experts regarding the aerial photographs taken of the subject property, the magistrate specifically found that "several reliable witnesses were able to remember and testify that mining operations had ceased to exist between the years of 1959-1975." Based on that finding, the magistrate logically reasoned that there could not have been any mineral extractions from the property in 1968, and affirmed the BZA's decision. The trial court then reviewed appellants' objections to the magistrate's decision, as well as reviewed the record independent of the magistrate's findings. In its judgment entry adopting the magistrate's decision, the trial court subsequently held that the magistrate "properly determined the factual issues and correctly

applied the law." After an exhaustive review of the record, we find that the trial court did not abuse its discretion by adopting the magistrate's decision which affirmed the decision of the BZA.

{¶ 29} Appellants' first and second assignments of error are overruled.

III

{¶ 30} All of appellants' assignments of error having been overruled, the judgment of the trial court is affirmed.

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BROGAN, J. and GRADY, J., concur.

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