[Cite as *Wilson v. Bethel Twp. Bd. of Zoning Appeals*, 2010-Ohio-27.]

IN THE COURT OF APPEALS FOR MIAMI COUNTY, OHIO

JASON A. WILSON, et al. :

Plaintiffs-Appellants : C.A. CASE NO. 2009 CA 10

v. : T.C. NO. 08-724

BETHEL 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 8th day of January, 2010.

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BROGAN, J.

{¶ 1} Plaintiff-appellants Jason A. Wilson and Richard P. Moran (hereinafter "Appellants") appeal a judgment of the Miami County Court of Common Pleas which affirmed the decision of defendant-appellee Bethel Township Board of Zoning Appeals (hereinafter

"BZA"), in which the BZA ultimately granted a conditional use permit to Darin and Cynthia Morris (hereinafter "the Morrises") to build a motor cross track on their property for use in a religious based mentoring program for at-risk youth. The program incorporated instruction in the use of motor cross bikes as a means of rewarding the youth being counseled at the facility.

I

{¶ 2} On April 29, 2008, the Morrises filed an application for a conditional use permit with the BZA. The Morrises live on a six acre parcel of property (hereinafter "the property") located at 5845 Ross Road in Tipp City, Ohio. The property is zoned for domestic agricultural use.

{¶ 3} It is undisputed that the Morrises failed to properly complete their application, failing to include their telephone number, as well as failing to provide a citation to the section of the Bethel Township Zoning Resolution under which they sought a conditional use permit. The Morrises also failed to have their application notarized.

{¶ 4} Despite these defects, the BZA accepted the Morrises' application and held two public hearings on May 15, 2008, and July 17, 2008, in which it heard the testimony of several individuals. The first meeting closed with the BZA tabling discussion of whether the conditional permit should be granted until further information could be collected regarding the motor cross track's impact on the surrounding properties. Specifically, the BZA focused on the track's potential effect on noise levels in the area.

{¶ 5} At the second hearing on July 17, 2008, the BZA heard testimony regarding the type and number of motor bikes that would be used, the frequency of their use, and the level of noise that could be anticipated. Testimony was adduced that the County Sheriff could enforce

Bethel Township's noise resolution. Among those who testified was Mike Gebhart, Director of Planning and Zoning for Bethel Township. Gebhart testified that, in his professional opinion, more testing needed to be performed in order to determine the noise levels that would be generated by the motor cross bikes. Gebhart proposed that any decision regarding the issuance of a conditional use permit should be delayed until more information could be gathered on the noise levels produced by the motor cross bikes.

{¶ 6} At the close of the hearing, the BZA held a vote on the issuance of the conditional permit, apparently disregarding Gebhart's concerns over the noise levels. The Morrises' permit request was ultimately granted by the BZA, subject to the following conditions:

{¶ 7} "1) They meet no more than twice a week.

{¶ 8} "2) No more than six participants.

{¶ 9} "3) Moto-cross hours of operation Tuesdays between 6-8 p.m. and Saturdays between 1-3 p.m.

{¶ 10} "4) A one year conditional use."

{¶ 11} Appellants appealed the BZA's decision to the Miami Court of Common Pleas. On February 3, 2009, the trial court issued a decision in which it affirmed the BZA's decision and found that "order is supported by a preponderance of substantial, reliable, and probative evidence." The court also held that the conditional use permit was subject to the conditions imposed by the BZA.

{¶ 12} It is from this judgment that Wilson and Moran now appeal.

II

{¶ 13} Appellant's first assignment of error is as follows:

{¶ 14} "THE BETHEL TOWNSHIP BOARD OF ZONING APPEALS ERRED BY GRANTING A CONDITIONAL USE CERTIFICATE WHEN THE APPLICATION FOR SUCH CERTIFICATE FAILED TO COMPLY WITH THE REQUIREMENTS OF THE BETHEL TOWNSHIP ZONING RESOLUTION."

{¶ 15} In their first assignment, appellants contend that the trial court erred when it affirmed the decision of the BZA since the Morrises' application for their conditional use permit did not comply with the express terms of the BZA's zoning resolution. Specifically, appellants note that the Morrises failed to indicate on the application the section of the zoning resolution under which the conditional use was sought, and neglected to set forth their telephone number on the application as required by the express terms of the resolution. Also, appellants note the conditional use application contains a section at the end of the document which clearly indicates that the finished application must be notarized, and there is no dispute that the Morrises failed to have their application notarized as required by the language in the application.

{¶ 16} Section 2.05(A)(4) of the zoning resolution states in pertinent part:

{¶ 17} "4. Conditional Use Permits

{¶ 18} "To hear and decide only such conditional uses as the Board of Appeals is specifically authorized to pass on under the terms of this Resolution or to deny Conditional Use Permits when not in harmony with the intent and purpose of this Resolution of the Strategic Development Plan. *The following requirements shall be complied prior to any approval or denial of a conditional use permit by the Board of Appeals*.

{¶ 19} "a. A written application for a conditional use is submitted indicating the section of this Resolution under which the conditional use is sought and stating the grounds on which it

is requested."

{¶ 20} Additionally, Section 2.05(D)(2) states in pertinent part:

{¶ 21} "2. Contents of Conditional Use Permit Application

{¶ 22} "Any owner or agent thereof, of property for which a conditional use is proposed shall make an application for a conditional use permit by filing it with the Zoning Administrator. *The application shall contain the following information:* (Emphasis added.)

{¶ 23} "a. Name, address, and *phone number* of the applicant."

{¶ 24} Although appellants' assignment of error is misdirected toward the actions of the BZA, we will construe the assignment as asserting that the trial court erred in affirming the BZA's decision to issue the Morrises a conditional use permit. Appellants argue that the trial court erred in finding the requirements in the township's conditional use application process were directory and not mandatory. Appellants argue the application requirements were mandatory and the applicants' failure to comply with those requirements deprived the BZA of authority to act upon the application.

{¶ 25} The BZA argues that the Morrises' application substantially complied with its requirements of their zoning resolution. In particular, they note the Morrises' application gave a description of the conditional use that was sought, the property upon which the use was to be made, and the current zoning of that property. The BZA also notes there is no requirement in their zoning resolution or the Revised Code that the application be notarized and in any event the applicant testified under oath concerning the application for the permit. The BZA notes that while the resolution required the applicant to include his phone number, the Morrises provided a mailing address as contact information. Lastly, the BZA argues the trial court did not abuse its

discretion in finding that the applicants substantially complied with the Township's application requirements.

{¶ 26} The Fifth District court of Appeals in *Highlanders Enterprise, LLC v. Chester Township Board of Zoning Appeals*, Morrow App. No. 2009-CA-0001, 2009-Ohio-3402, recently held that an applicant's failure to comply with the mandatory requirements of notice to the county engineer pursuant to R.C. 519.141 did not deprive the BZA of subject matter jurisdiction to consider the applicant's application for a conditional use certificate. The court of appeals held the failure to raise the issue below amounted to a waiver of the failure of the applicant to comply with the requirements of R.C. 519.141.

{¶ 27} We agree with the appellees that the BZA did not lose jurisdiction to consider the Morrises' application because they did not strictly comply with the requirements of the zoning resolution. Everyone at the BZA hearing knew who the applicants were, what they were seeking, and under which section of the zoning resolution the conditional use was sought. (See Minutes of BZA meeting, "applicant is requesting the BZA grant a CONDITIONAL USE under Sec. 15.04 of the Bethel Zoning Resolution, to operate * * * " a motor cross track on site and the property in question is described.). Two separate hearings were conducted and no one questioned the adequacy of the Morrises' application. Indeed, Jennifer Wilson spoke in opposition to the Morrises' application because of noise concerns. (See Tr. of July 17, 2008 hearing at page 44.)

{¶ 28} The BZA was in the best position to determine whether the Morrises' application substantially complied with its resolution's requirements. The Wilson lodged no objection to the application on technical grounds and, thus, waived any right to object to it at the trial court

level. The BZA had jurisdiction to hear the Morrises' application. The appellant's first assignment is Overruled.

III

{¶ 29} Appellants' second and final assignment of error is as follows:

{¶ 30} "THE BETHEL TOWNSHIP BOARD OF ZONING APPEALS ERRED BY GRANTING A CONDITIONAL USE CERTIFICATE WITHOUT A PREPONDERANCE OF RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE TO SUPPORT THE DECISION TO ISSUE THE SAME."

{¶ 31} In the second assignment, appellants contend the BZA erred in granting the conditional use permit without a preponderance of reliable, probative and substantial evidence to support its decision. Again, appellants misdirect this assignment to the actions of the BZA and not the trial court whose actions this Court reviews.

{¶ 32} The Appellants contend that because the zoning resolution does not specifically list a motor cross track as a conditional use in an A-1, domestic agricultural zone, the BZA is without authority to permit the same. Appellants also contend that the BZA's decision was rendered in error because it did not specifically address the nine factors listed in section 2.05(B)(3). Finally, the appellants contend that the BZA did not consider the question of the noise that may be generated by the applicants' proposed use because the Bethel Township Director of Planning and Zoning wanted to acquire more information regarding noise.

{¶ 33} We agree with appellee that it had authority to grant a conditional use permit for the operation of a motor cross track on the Morrises' property despite the fact it is not specifically listed as a permitted conditional use in the domestic agricultural zone. Section

15.04 of the Resolution lists three categories of conditional uses that are permitted in a domestic agricultural zone, to-wit: Residential Uses, Public and Semi-Public Uses and Non-Commercial Parks and Recreation. Non-Commercial Parks and Recreation are permitted uses in the category of Public and Semi-Public Uses. Although Non-Commercial Parks and Recreation are not defined, Commercial Recreation is defined as a business open for a fee, the primary purpose of which is to provide the general public with an amusing or entertaining activity. Commercial recreational facilities may include, but are not limited to water parks, skating rinks, billiard parlors, driving ranges, and batting cages. A motor cross track is similar to these recreational facilities and, if operated as a non-profit activity, would comfortably fit within the conditional uses permitted under the Public and Semi-Public uses in a Domestic Agricultural District.

{¶ 34} Secondly, appellants argue the BZA's decision to grant the conditional use permit could not have been based upon a preponderance of reliable, probative and substantial evidence because the BZA did not address the nine factors listed in Section 2.05(B)(3) of the Resolution. That Section provides as follows:

{¶ 35} "In addition to the specific requirements for conditionally permitted uses, the Board shall review the particular facts and circumstances of each proposed use in terms of the following standards and shall find adequate evidence showing that such use at the proposed location:

{¶ 36} "a. Is in fact a conditional use as established under the provisions of this Resolution and appears on the list of conditionally permitted uses adopted for the district involved;

{¶ 37} "b. Will be in accordance with the general objectives, or with any

comprehensive plan and/or the zoning resolution;

{¶ 38} "c. Will be designed, constructed, operated and maintained so as to be harmonious and appropriate in appearance with the existing or intending character of the general vicinity and that such use will not change the essential character of the same area;

{¶ 39} "d. Will not be hazardous or disturbing to existing or future neighboring uses;

{¶ 40} "e. Will be served adequately by essential public facilities and services such as highways, streets, police and fire protection, drainage structures, refuse disposal, water and sewer; and schools; or that the persons or agencies responsible for the establishment of the proposed use shall be able to provide adequately any such services;

{¶ 41} "f. Will not create excessive additional requirements at public cost for public facilities and services and will not be detrimental to the economic welfare of the community;

{¶ 42} "g. Will not involve uses, activities, processes, materials, equipment and conditions of operation that will be detrimental to any persons, property, or the general welfare by reason of excessive production of traffic, noise, smoke, fumes, glare, or odors.

{¶ 43} "h. Will have vehicular approaches to the property which shall be so designed as not to create an interference with traffic on surrounding public thoroughfares;

{¶ 44} "I. Will not result in the destruction, or loss of a natural, scenic, or historic feature of major importance."

{¶ 45} In *Donson v. Board of Zoning Appeals of Jackson Township*, Montgomery App. No. 19153, 2002-Ohio-2276, this Court found that the township BZA did not comply with township zoning regulation for conditional use permits, requiring the board to make specific findings of fact that support nine listed conclusions when the board addressed only one of the

nine conclusions when granting the property owner's application for a conditional use permit and, thus, the trial court abused its discretion in affirming the decision of the board.

{¶ 46} Appellee argues that the trial court did not err in affirming its decision to grant the conditional use permit because *Donson* is inapposite to the facts in this matter. In particular, the BZA notes that the Jackson Township Zoning Resolution provided that "the Board shall not grant a conditional use permit unless it shall, in each specific case, make specific findings of fact directly based on the particular evidence presented to it * * * ." Id at 2. Appellee argues its resolution merely requires it to review the particular facts and circumstances of each proposed use in terms of the nine standards listed in Section 2.05(B)(3). We agree with appellee's argument in this regard.

{¶ 47} Some of the standards listed in the Resolution have little relevance to the particular facts and circumstances of the proposed use in issue before the BZA. The critical issue before the BZA was whether the proposed motor cross activity would be detrimental to any persons, property, or the general welfare by reason of excessive noise.

{¶ 48} The major objection raised by the surrounding neighbors to the Morrises' property was the motor cross track would cause too much noise. There was some concern expressed about whether the activity would cause an unusual amount of dust and whether it would cause drainage problems after the track was constructed. The trial court found, and we agree, the BZA heard sufficient evidence that the proposed use would not cause excessive noise. Darin Morris testified that the standard push lawnmower emits 91 decibels (using OSHA's website). Morris noted the motor cross bikes are rated at the high 60's in decibels. One neighbor spoke at the July meeting and noted that he wears a hearing aid and watched a demonstration of the bikes. He

noted that he stood right next to the bikes and he opined that the lawn mowers used in the neighborhood are a lot noisier than the bikes. (Tr. 57, July meeting.) Nicole O'Quin, a neighbor, stated she was quite familiar with dirt bikes and motorcycles and the Honda bike that Darin Morris was demonstrating is a quiet baffled 4-cycle bike.

{¶ 49} At the July 17, 2008, hearing, Mike Gebhart, the Director of Planning and Zoning for the Township, testified that he wanted to get a decibel meter and "get into your woods and hear what you're hearing." Gebhart did testify the Township Zoning Resolution regulates noise levels, and the County Sheriff would enforce those restrictions upon complaint of the neighbors. He stated the decibel level permitted during day hours was 65 decibels at the closest point to a property line. (Tr. 71, July hearing.)

{¶ 50} Importantly, the BZA placed significant conditions on the conditional use granted the applicants. The motor cross operation would only be permitted between 6:00 and 8:00 p.m. on Tuesdays and Saturdays from 1:00 to 3:00 p.m. No more than six participants or bikes would be permitted at one time, and the size of the track must be reduced from two to one and one-half acres to utilize the grouping of trees on the east side of the property for the screening of the neighbors to the east. There was also testimony offered by Darin Morris that he planned on planting pine trees as an additional wind and sound barrier. There was testimony that dust would be kept to a minimum because the track would only be 15 feet wide over a three-acre tract of land. Lastly, there was no testimony offered that the small track would exacerbate the drainage problem that pre-existed during heavy rains.

{¶ 51} Initially, we note that R.C. Chapter 2506, which governs administrative appeals, provides at R.C. 2506.04 that:

{¶ 52} "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. * * * "

{¶ 53} Thus, the standard of review applied by the trial court is whether there is a preponderance of reliable, probative and substantial evidence in the record to support the administrative agency's decision. *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34; *Dudukovich v. Lorain Metro. Hous. Auth.* (1979), 58 Ohio St.2d 202, 207.

{¶ 54} The trial court must give due deference to the agency's resolution of evidentiary conflicts, *Univ. Of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111, and the court may not substitute its judgment for that of the agency. *Dudukovich,* 58 Ohio St.2d at 207. Furthermore, the 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* (1993), 66 Ohio St.3d 452, 456. See, also, *C. Miller Chevrolet, Inc. v. Willoughby Hills* (1974), 38 Ohio St.2d 298.

{¶ 55} As an appellate court, our review is limited to a determination of whether we can say, as a matter of law, that the decision of the trial court is not supported by a preponderance of reliable, probative and substantial evidence. *Kisil* at 34; *Meadow Creek* Co., Inc. v. Brimfield Twp. (June 30, 1994), Portage App. No. 93-P-0070. We do not have the authority to weigh the preponderance of reliable, probative and substantial evidence as is granted to the trial court. *Kisil* at 34. (footnote 4.)

{¶ 56} We cannot say as a matter of law that the decision of the trial court to affirm the decision of the BZA was not supported by a preponderance of reliable, probative and substantial

evidence. The appellant's second assignment is Overruled. The judgment of the trial court is Affirmed.

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FROELICH, J., concurs.

DONOVAN, P.J., concurs in judgment only.

Copies mailed to:

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