[Cite as *Hollinger v. Pike Twp. Bd. of Zoning Appeals*, 2010-Ohio-5097.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MATTHEW HOLLINGER, et al.

Appellants

-vs-

PIKE TOWNSHIP BOARD OF ZONING APPEALS

Appellee

JUDGES:
Hon. William B. Hoffman, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 2009 CA 00275

O P I N I O N

CHARACTER OF PROCEEDING: Civil Appeal from the Court of Common Pleas, Case No. 2009 CV 02313

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: October 18, 2010

APPEARANCES:

For Appellants

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Wise, J.

{¶1} Appellants Matthew and Lisa Hollinger appeal from the decision of the Court of Common Pleas, Stark County, which affirmed the decision of Appellee Pike Township Board of Zoning Appeals ("BZA") denying their request for a conditional use permit. The relevant facts leading to this appeal are as follows.

{¶2} Appellants are the owners of approximately 370 acres of former strip mine land in Pike Township, Stark County. It is undisputed that appellants' land is presently surrounded on three sides by residential neighborhoods, but there are substantial tree and brush areas separating the interior region of the parcel from adjoining properties. Appellants' acreage is zoned "R-1 Residential District," which includes the potential for conditional use as a privately-operated park or recreation area under the Pike Township Zoning Resolution. Section 7 of said Resolution includes, inter alia, the following "General Standards":

{¶3} "1. [The use] [w]ill be designed, constructed, operated and maintained so as to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity and such use will not change the essential character of the same area.

{¶4} "2. Will not be hazardous or disturbing to existing or future neighboring uses.

{¶5} "3. Will not be detrimental to property in the immediate vicinity or to the community as a whole."

{¶6} Appellants duly requested a conditional use permit to operate an all-terrain vehicle ("ATV") riding park on part of the aforesaid property. Following a public hearing on May 20, 2009, Appellee Pike Township BZA denied appellants' conditional use application for the proposed ATV riding park, determining that appellants could not adhere to General Standards 1, 2, and 3, supra.

{¶7} On June 12, 2009, appellants filed a notice of administrative appeal to the Stark County Court of Common Pleas (hereinafter "trial court"), pursuant to R.C. 2506.01 et seq.

{¶8} On September 24, 2009, pursuant to R.C. 2506.03, the trial court conducted an evidentiary hearing, which included testimony from two BZA members and a planning and zoning consultant. The trial court also conducted an on-site view of appellants' property, without objection by the parties. See Tr. at 6-7.

{¶9} On October 20, 2009, the trial court issued a judgment entry affirming the decision of the BZA to deny the conditional use request.

{¶10} On November 9, 2009, appellants filed a notice of appeal. They herein raise the following sole Assignment of Error:

{¶11} "THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT THE PIKE TOWNSHIP BOARD OF ZONING APPEALS DECISION WAS SUPPORTED BY A PREPONDERANCE OF RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE.

I.

{¶12} In their sole Assignment of Error, appellants contend the trial court abused its discretion in affirming the decision of the Pike Township BZA. We disagree.

Trial Court's Standard of Review

{¶13} R.C. 2506.04 sets forth the applicable standard of review for a court of common pleas in an administrative appeal. It provides as follows:

{¶14} " * * * [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. The judgment of the court may be appealed by any party on questions of law as provided in the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505 of the Revised Code."

{¶15} In reviewing an appeal of an administrative decision, a court of common pleas begins with the presumption that the board's determination is valid, and the appealing party bears the burden of showing otherwise. See *C. Miller Chevrolet v. Willoughby Hills* (1974), 38 Ohio St.2d 298, 302, 313 N.E.2d 400.

{¶16} The Ohio Supreme Court further stated as follows in *Henley v. Youngstown Bd. of Zoning Appeals* (2000), 90 Ohio St.3d 142, 147, 735 N.E.2d 433:

{¶17} "[W]e have distinguished the standard of review to be applied by common pleas courts and courts of appeals in R.C. Chapter 2506 administrative appeals. The common pleas court considers the 'whole record,' including any new or additional evidence admitted under R.C. 2506.03, and determines whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence. See *Smith v. Granville Twp. Bd. of Trustees* (1998), 81 Ohio St.3d 608, 612, 693 N.E.2d 219, * * * citing *Dudukovich v. Lorain Metro. Hous. Auth.* (1979), 58 Ohio St.2d 202, 206-207, 12 O.O.3d 198, 389 N.E.2d 1113 * * *."

Appellate Standard of Review

{¶18} As an appellate court, however, our standard of review to be applied in an R.C. 2506.04 appeal is "more limited in scope." *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34, 12 OBR 26, 465 N.E.2d 848. "This statute grants a more limited power to the court of appeals to review the judgment of the common pleas court only on 'questions of law,' which does not include the same extensive power to weigh 'the preponderance of substantial, reliable and probative evidence,' as is granted to the common pleas court." *Id.* at f.n. 4. See, also, *Health Management, Inc. v. Union Twp. Bd. of Zoning Appeals* (1997), 118 Ohio App.3d 281, 285, 692 N.E.2d 667. "It is incumbent on the trial court to examine the evidence. Such is not the charge of the appellate court." *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 261, 533 N.E.2d 264. Ultimately, the standard of review for appellate courts in a 2506 zoning appeal is whether the common pleas court abused its discretion in finding that the administrative order was or was not unconstitutional, illegal, arbitrary, capricious, unreasonable or unsupported by reliable, probative and substantial evidence. See *Weber v. Troy Twp. Bd. of Zoning Appeals,* Delaware App.No. 07 CAH 04 0017, 2008-Ohio-1163, ¶ 13 (additional citation omitted); *Powers v. City of Rocky River Bd. of Zoning Appeals* (Nov. 7, 1996), Cuyahoga App.No. 70439, 1996 WL 648689. Nonetheless, zoning regulations are in derogation of common law and must be strictly construed and not extended by implication. See, e.g., *Likins v. Dayton Motorcycle Club* (1972), 33 Ohio App.2d 269, 294 N.E.2d 227.

Synopsis of the BZA Testimony

{¶19} Our review of the record on appeal reveals the following testimony from the BZA hearing. Appellant Matthew Hollinger was the first to speak. He noted, inter alia, that he has had ongoing problems preventing trespassing off-road enthusiasts from using the property, and he maintained that an organized and supervised ATV park and trail system would curtail the illegal activity on the property.

{¶20} Sharon Perrine, the Pike Township Zoning Inspector, testified that the property in question had not been the subject of any formal noise or dust complaints, but there had been nuisance issues regarding one entry area of the property where ATV trailers had been parked and trash had been left behind. She expressed her belief that appellants could "meet all of the requirements by the zoning book." BZA Tr. at 51. Her only concern had to do with ODOT requirements for ingress-egress roads.

{¶21} Robert Lahmers, an ATV rider, described his experience with utilizing an organized ATV park in Waynesburg, Ohio. He opined that if appellants were to run their proposed park with enforced rules in the same fashion as a similar ATV park in nearby Waynesburg, "you'll never have a headache." Id. at 54.

{¶22} Mark Daverio next came to the microphone. He stated he has lived in the neighborhood near appellants' property, and he "enjoy[s] the quiet, the serenity, the wildlife." BZA Tr. at 61. He was concerned that the noise of the ATVs would negatively impact the animals in the area.

{¶23} Mike Reidl also spoke before the BZA. He presented a petition against approving the zoning permit, signed by some of the residents of his neighborhood. He also stated, in part, the following:

{¶24} "MR. REIDL: Okay. ATV's should not be run in a park. They are expensive machinery. They are a fast and complicated piece of equipment. They are expensive to run and at times are dangerous for riders and bystanders. They need large areas to operate, and they run through streams, high walls, through the woods, and they have – guys like to ride hill-climbs with them, so they get really loud.

{¶25} "The ninety-six decibels is fine for one, maybe two ATV's, but when you get a hundred that noise just compounds and it travels for miles. My wife and I took a ride last week and we drove around the other ATV areas, and Mr. McCall said there was about seventy homes around his former place. The areas we looked at were Bear Creek, the Battlesburg Motocross, the Outlaw Extreme and Malvern Motocross. The most houses we could find close to those parks was ten to twelve.

{¶26} "In driving around this area, which included Route 800, East Sparta Avenue, Howenstine Drive, Battlesburg, Maplehurst and Ridge Road, there's three hundred eighty-eight houses, and they are all within a half mile of this property. This area, we don't feel, is suited for this proposed site. ***" Tr. at 75-76.

{¶27} Jerry Wilson, a resident of East Sparta, added, in part, the following observations:

{¶28} "MR. WILSON: * * * Thank you for this time for addressing the board. The concerns I have with this here basically has been mentioned, basically been addressed here with Mr. Hollinger. The noise level is there now, and also Mr. Reidl suggested the noise level is going to increase at this time. The dirt level, the dust level is going to increase more.

{¶29} "You say there's fifty people at this time on this park per day. A hundred people is going to double everything. We just talked about, dust, pollution, streams, everything. The dust coming off is going to rise through the air and go from your property over to my property which, again, I'm going to constantly maintain my property and all the three hundred eighty houses around your property is going to have to be maintained.

{¶30} "Are you prepared to maintain my property for me by putting a trail on your property? The dust is going to travel. You can't keep that down. The noise is going to travel. We have it. Now it's going to multiply. It's going to multiply more, and as it gets known more and more, it's going to multiply more and more and more. A hundred people. Then as soon as it gets good, we all know this hundred will become two hundred, two hundred will soon become three hundred at this time sooner or later.

{¶31} "You also said these people you don't want on there. If you're so much against people riding on it, why are you building there, a park there to start with? Okay. * * *" Tr. at 81-82.

{¶32} Nancy Dolvin noted her concern about the safety of the proposed entranceway, given the traffic on Route 800. Kathleen Gabber questioned Appellant Matthew Hollinger about his purported intent to purchase an adjoining 61-acre parcel, and whether this would lead to a "larger park." BZA Tr. at 102. Jack Wilson stated that "*** a hundred ATV's at the accepted American Motorcycle Association volume, it seems to me, is going to make a lot of noise." BZA Tr. at 105. Donna Meese, whose property abuts appellants' parcel, noted her concerns about the potential noise level's effect of wildlife, and the potential risk to her grandchildren. Mike Farber testified that many times in the past, he has planted rows of trees on his property, but upon returning to the area, found that "somebody on a four-wheeler just went right down the road killing every tree." BZA Tr. at 110. Farber was not "a hundred percent against" appellants' planned use, but did not "trust that it's going to work out that way ***." Id. at 112. Additionally, the BZA heard from area residents or landowners Kathleen DiLoreto, Beth Knox, Chris McCoy, Angela Tucke, Victoria Joiner, and Larry Bowling.

Synopsis of the Common Pleas Testimony

{¶33} In addition, as noted in our recitation of facts, at the appeal hearing before the common pleas court, testimony was taken from BZA Chairperson Nancy Snyder and BZA member Jerry Eibel. The trial court also heard from appellants' expert, Mark Majewski, a planning consultant, who opined that "the proposed use as proposed by the applicant complies with the standards of the [Pike Township] zoning resolution." Tr. at 34.[1] The court also heard from Attorney John McCall, the owner of a similar ATV park in Sandy Township, who spoke concerning his experience in operating such a facility.

{¶34} Appellants direct us in particular to an answer Chairperson Snyder gave before the common pleas court:

[1] On cross-examination, Majewski conceded that increased noise, dust, and traffic resulting from a hypothetical commercial enterprise in a residential area may be a disturbance, nuisance, or hazard to the immediate vicinity or to the community, depending on its location. Tr. at 52-53.

{¶35} "Q. What facts did [the BZA witnesses] offer you to support their proposition that Mr. Hollinger's operation would be as disruptive as the illegal operation that was going on?

{¶36} "Snyder: I don't really think I can answer that the way you want me to answer it. They gave me their opinion and I feel that their opinion – as far as facts are concerned, what facts could they present other than their opinion as we all do." Tr. at 135-136.

{¶37} Appellee, in its response, points out that Snyder gave a more expansive answer at another point in the proceedings:

{¶38} "Q. So is it fair to say you didn't follow that rule in forming your personal decision?

{¶39} "Snyder: I would say that I formed my opinion from the input that I had that night and the input that I got prior to the hearing. So to focus on one thing, the public opinion, I think is somewhat misleading because my opinion or decision I should say was based on a number of factors." Tr. at 101.

{¶40} We further note BZA member Jerry Eibel's testimony as follows:

{¶41} "Q. Did you base your decision on public opinion expressed at that hearing?

{¶42} "Mr. Eibel. No sir. (Tr. at 104).

{¶43} "* * *

{¶44} "Q. Did you think about the specific requirements of the conditional use permit in formulating your decision as to the General Standards?

{¶45} "Mr. Eibel. I looked at them. Item number 15 kind of bothered me because it's a nuisance so that was one of my considerations with some nuisance to the neighborhood or to the community.

{¶46} "Q. What do you understand to be a nuisance?

{¶47} "Mr. Eibel. Excessive noise is a nuisance. Excessive dust is a nuisance. Excessive traffic could be a nuisance. To people that live there it's a nuisance. To Mr. Hollinger, he doesn't live there, it is not a nuisance. So that's why I looked at it as a community and the neighbors, it was going to be a nuisance to them. (Tr. at 107-108).

{¶48} "* * *

{¶49} "Q. What was the reason that you voted no?

{¶50} "Mr. Eibel. Because it is not harmonious to the community, you put a track in the middle of three allotments, it is hazardous, it is noisy. And it did not meet the three General Standards that I was looking at as a board member. That's what I got to go by. That's the rules I look at that. To me those did not meet those three General Standards. That'[s] what I thought. Personally I would not want it. But I have no say about that. If it goes through it goes through. I got to live with it or move out of the neighborhood, so no, it was based on those three general rules (Tr. at 113)

{¶51} "* * *

{¶52} "Q. Did you base your decision to deny him the right to use his property as an ATV park based upon your experience of listening to these trespassing vehicles that are currently on his property?

{¶53} "Mr. Eibel. No, sir, based upon the three General Standards.

{¶54} "Q. What I am asking you is what facts -- what did you see on the land, what did you hear in the testimony that caused you to believe that those three General Standards could not be met?

{¶55} "Mr. Eibel. Definitely not harmonious to the neighborhood.

{¶56} "Q. What facts caused you to believe it was not harmonious?

{¶57} "Mr. Eibel. Well, an ATV track in the middle of an allotment or three allotments, how can that be harmonious to the neighborhood? Number two, it's disruptive, it's noisy, hazardous; and number three, the dirt and dust, noise, traffic and anything else would definitely be dangerous to the people in the neighborhood and it will definitely bring down property values. I don't care what Mr. McCall says, it will bring down the property value because people will not live there with a racetrack in their backyard. (Tr at 115-117).

Analysis

{¶58} Appellants first contend the BZA acted arbitrarily and capriciously regarding the provision to appellants of a meaningful opportunity to be heard, and thus the trial court abused its discretion in affirming the BZA's decision. In support, appellants direct us to *Summit County v. Stoll*, Summit App.No. 23465, 2007-Ohio-2887, wherein the Ninth District Court of Appeals concluded that disregard of internal agency procedural rules an administrative agency in an R.C. 2506 appeal causes the decision to be unlawful or arbitrary. Appellants, as indicated above, maintain that BZA Chairperson Nancy Snyder admitted to the common pleas court that she considered public opinion as part of her role in the BZA's decision, thus failing to adhere to the BZA's internal rule that public opinion is not to be considered evidence. See Tr. at 100.

Appellants also point out that her vote in the BZA decision was partially based on her private research of "United States Consumer Products Association" information and her personal opinion concerning ATV usage. See Tr. at 91-98. Appellants maintain such information was not competent evidence and that they were not properly afforded an opportunity to respond thereto at the BZA hearing.

{¶59} Appellants also contend that most or all of the testimony in opposition to their application was not competent evidence. They maintain that the BZA testimony was essentially opinion evidence that simply speculated on negative effects of an ATV park. Appellants point out that the Eleventh District Court of Appeals has stated: "The ploy of swearing in the members of the public [at BZA hearings] does not alter the fact that the bulk of these witnesses are merely offering their subjective and speculative comments and unsubstantiated opinions. Such testimony cannot rise to the level of the reliable, probative, and substantial evidence *** unless there are facts included as part of those opinions." *Adelman Real Estate Co. v. Gabanic* (1996), 109 Ohio App.3d 689, 694, 672 N.E.2d 1087.

{¶60} However, in *North Coast Payphones, Inc. v. Cleveland*, Cuyahoga App.No. 88190, 2007-Ohio-6991, the Eighth District Court of Appeals recognized: "Since the BZA is not a court of law, it is not required to follow the rules of evidence, including the admissibility of evidence and hearsay testimony, as well as rulings on objections. The fact that the BZA may be composed of a body of lay people must be taken into consideration * * *." Id. at ¶ 11.

{¶61} As appellee aptly suggests in its response, the law should not require a member of a zoning appeal board to completely set aside his or her knowledge, common sense, or personal experiences, or that of testifying residents, when evaluating any matter. As such, we interpret the “public opinion” clause in the zoning resolution to express the township’s intention that BZA hearings focus on applying factual evidence to the zoning standards, rather than allowing BZA proceedings to devolve into rote accedence to local pressure. In that light, we disagree with appellants’ contention that the neighboring residents’ testimony “consisted of nothing more than speculations that Hollinger would not operate the park in accordance with the restrictions he testified that he would implement ***.” Appellants’ Brief at 15. The record makes clear that several of these residents are knowledgeable about ATV usage in general or have had unpleasant first-hand experience with years of unsanctioned off-road activities on appellants’ land, and whatever level of “speculation” one would attach to their testimony is certainly matched by appellants’ rather optimistic assurances that an approved ATV park at the site would not exacerbate the past problems.

{¶62} Accordingly, upon review, we are unable to conclude the trial court in this instance acted unreasonably, arbitrarily, or unconscionably in finding the BZA decision was supported by reliable, probative and substantial evidence and was not arbitrary or capricious.

Conclusion

{¶63} Accordingly, pursuant to the Pike Township zoning requirements, and based on our more limited standard of review as an appellate court in an R.C. 2506 appeal, we find no abuse of discretion or reversible error in the trial court's affirmance of the decision of the BZA and its finding that the proposed ATV park would not comply with zoning regulations regarding conditional use permits.

{¶64} Appellants' sole Assignment of Error is overruled.

{¶65} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Stark County, Ohio, is hereby affirmed.

By: Wise, J.

Hoffman, P. J., and

Delaney, J., concur.

JUDGES

JWW/d 0920

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MATTHEW HOLLINGER, et al.	:	
Appellants	:	
-vs-	:	JUDGMENT ENTRY
PIKE TOWNSHIP BOARD OF ZONING APPEALS	:	
Appellee	:	Case No. 2009 CA 00275

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

Costs assessed to appellant.

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JUDGES