**[Cite as *Kraus v. Riggenbach*, 2018-Ohio-2008.]**

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| ROBERT KRAUS, ET AL.<br><br>Appellants/<br>Cross-Appellees-Appellants<br><br>-vs-<br><br>DALE RIGGENBACH, NIMISHILLEN TOWNSHIP ZONING INSPECTOR, ET AL.<br><br>Appellees/<br>Cross-Appellants-Appellees | JUDGES:<br>Hon. John W. Wise, P.J.<br>Hon. W. Scott Gwin, J.<br>Hon. William B. Hoffman, J.<br><br>Case No. 2017CA00200<br><br>O P I N I O N |

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| CHARACTER OF PROCEEDING: | Appeal from the Stark County Common Pleas Court, Case No. 2017CV00629 |
| JUDGMENT: | Affirmed |
| DATE OF JUDGMENT ENTRY: | May 21, 2018 |

APPEARANCES:

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| For Appellants | For Appellee - Dale Riggenbach |
| JOHN L. JURGENSEN<br>6545 Market Ave N.<br>North Canton, Ohio 44721 | JOHN D. FERRERO<br>Stark County Prosecutor's Office<br>JESSICA LOGOTHETIDES<br>Assistant Prosecuting Attorney<br>110 Central Plaza S., Suite 510<br>Canton, Ohio 44702 |

For Appellees –
Joseph and Sherri Davide

JAMES F. MATHEWS
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*Hoffman, J.*

**{¶1}** Appellants Robert and Nancy Krause appeal a decision of the Stark County Common Pleas Court affirming the decision of the Nimishillen Township Board of Zoning Appeals (BZA) which granted a conditional use permit and two variances to Appellees Joseph and Sherri Davide. Dale Riggenbach, Nimishillen Township Zoning Inspector, is also an appellee.

STATEMENT OF THE FACTS AND CASE

**{¶2}** The Davides own a home in an area of Nimishillen Township zoned rural residential. They own 5.65 acres and have two garages on the property. The maximum size permitted for an accessory building, without a variance, is 1280 square feet. One of the Davides' garages is 1702 square feet. The second garage had previously been granted a variance for 2400 square feet, but a 2976 square foot addition was added to the building.

**{¶3}** Joseph Davide owns and operates a cement contracting business. Two single-axle dump trucks and a one-ton pickup truck used in the business are parked at the home in the two garages. The garages are also used to store vehicles and personal items for use by the family.

**{¶4}** Employees of the cement business come to the home in the morning to pick up the company's trucks and take them to a customer's location. The vehicles are returned at the end of the work day. It takes employees two to five minutes to drive the vehicles up or down the driveway. The Davides further conduct bookkeeping activities for the business inside their home.

**{¶5}** In 2016, the Davides filed an application for a "home occupation" conditional use permit with the township in order to continue their business activities within the home. The application came before the BZA for a hearing on November 2, 2016. The permit was granted following the hearing. The BZA later discovered due to an error in the notice publication, notice of the hearing had not been given ten days in advance. The BZA met again on November 23, 2016, to conduct the hearing again with proper notice. Following this hearing, the BZA moved for a continuance to consult with legal counsel. On February 1, 2017, the BZA again voted to grant the conditional use permit.

**{¶6}** The Davides further sought variances for the two accessory buildings. Following a hearing on January 4, 2017, the BZA granted the variances.

**{¶7}** Appellants filed an appeal of both decisions to the Stark County Common Pleas Court. Appellees filed a cross-appeal. The court found the decisions of the BZA were not unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by sufficient substantial, reliable, and probative evidence on the record before it, and affirmed the decision of the BZA.

**{¶8}** It is from this judgment Appellants prosecute their appeal, assigning as error:

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT CONCLUDED THAT THE NIMISHILLEN TOWNSHIP BOARD OF ZONING APPEALS PROPERLY GRANTED THE CONDITIONAL USE PERMIT.

II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT CONCLUDED THAT THE NIMISHILLEN TOWNSHIP BOARD OF ZONING APPEALS PROPERLY GRANTED THE VARIANCES.

**{¶9}** Appellees Joseph and Sherri Davide assign a single cross-assignment of error:

THE TRIAL COURT ERRED, AS A MATTER OF LAW, AS PART OF ITS DECISION WHEN IT HELD THAT THE APPELLANTS HAD STANDING TO APPEAL AND THAT THE BOARD OF ZONING APPEALS HAD PROPERLY EXERCISED JURISDICTION TO 'RECONSIDER' A PRIOR DETERMINATION, AFTER A NOTICE OF APPEAL HAD ALREADY BEEN FILED THEREWITH.

STANDARD OF REVIEW

**{¶10}** Pursuant to R.C. 2506.04, in an administrative appeal, the common pleas court considers the whole record, including any new or additional evidence, and determines whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence. In reviewing an appeal of an administrative decision, a court of common pleas begins with the presumption the board's determination is valid, and the

appealing party bears the burden of showing otherwise. *Hollinger v. Pike Township Board of Zoning Appeals,* Stark App. No. 09CA00275, 2010–Ohio–5097, 2010 WL 4111162.

**{¶11}** As an appellate court, our standard of review to be applied in an R.C. 2506.04 appeal is "limited in scope." *Kisil v. Sandusky*, 12 Ohio St.3d 30, 465 N.E.2d 848 (1984). "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 the substantial, reliable, and probative evidence, as is granted to the common pleas court." *Id*. Ultimately, the standard of review for appellate courts in a R.C. 2506 appeal is "whether the common pleas court abused its discretion in finding that the administrative order was or was not supported by reliable, probative, and substantial evidence." *See Weber v. Troy Twp. Board of Zoning Appeals*, 5th Dist. Delaware No. 07 CAH 04 0017, 2008–Ohio–1163, 2008 WL 697384.

**{¶12}** "The standard of review for courts of appeals in administrative appeals is designed to strongly favor affirmance" and "permits reversal only when the common pleas court errs in its application or interpretation of the law or its decision is unsupported by a preponderance of the evidence as a matter of law." *Cleveland Clinic Foundation v. Cleveland Board of Zoning Appeals*, 141 Ohio St.3d 318, 2014–Ohio–4809, 23 N.E.3d 1161.

I.

**{¶13}** Appellants argue the court erred in affirming the decision of the BZA granting the conditional use permit for home occupation.

**{¶14}** Appellants argue the BZA erred in finding the Davides' request complied with the general standards for a conditional use permit for a home occupation as set forth in 1101.2(A)(1,)(2) and (3) of the Zoning Code:

> 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 on the proposed location:
>
> 1. will 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;
>
> 2. will not be hazardous or disturbing to existing or future neighboring uses;
>
> 3. will not be detrimental to the property in the immediate vicinity or to the community as a whole[.]

**{¶15}** Appellants further argue the conditional use does not meet the specific requirements set forth in Zoning Code 1102(115) (a), (c), (d), and (f):

> Such use shall be conducted entirely within the dwelling unit, and no use of any accessory building or yard space shall be permitted.
>
> ***

c. Such use shall be conducted only by persons residing in the dwelling unit.

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d. There shall be no display nor stock in trade nor commodities sold except those which are produced on the premises.

***

f. such uses shall not create a nuisance by reason of noise, odor, dust, vibration, fumes, smoke, electrical interference, or other causes.

**{¶16}** With regard to the general requirements, there was evidence before the BZA the use of the property by the Davides did not change the look of the neighborhood. The accessory buildings where the trucks are stored are set back from the roadway and obscured by trees. Several neighbors testified the use of the property is not disruptive, as the vehicles travel the driveway for only a few minutes, two times a day. Appellants acknowledged but for the vehicles, they would not be aware a home business was conducted from the Davides home. While some neighbors expressed concern over declining property values, the area was not rezoned and the use was limited to the Davides' property. We find the trial court did not abuse its discretion in finding the BZA did not err in concluding the use did not violate the general requirements set forth in Zoning Code 1101.2(A).

**{¶17}** Appellants argue the use is not confined to the dwelling unit as required by Zoning Code 1102(115)(a), as the trucks are stored in the accessory buildings.

**{¶18}** Storing business-related vehicles on property does not constitute a business use of the property or a "home occupation." *Wooten v. Neave Twp. Bd. of Zoning Appeals*, 150 Ohio App.3d 56, 2002-Ohio-5992, 779 N.E.2d 784, ¶ 16; *Miller v. Frye*, 5th Dist. Stark No. CA-8862, 1992 WL 238505, *3 (August 31, 1992). In the instant case, there is no evidence of other business activities being conducted in the accessory buildings beyond the mere storage of vehicles. Further, the accessory buildings were used by the family for storage of personal items as well as the trucks used in the business. We find the trial court did not abuse its discretion in finding the home occupation was not being conducted in the accessory buildings.

**{¶19}** Appellants argue the business use is not conducted only by persons living in the house because employees who do not live with the Davides drive the commercial trucks to and from the accessory buildings.

**{¶20}** In *Traub v. Johnson,* 12th Dist. Warren No. CA93-01-006, 1993 WL 243828 (July 6, 1993), the property owner operated an electrical contracting business from his property, which was zoned rural residential. Employees would drive to the location, leave their personal vehicles, and depart in vans to various job sites. In the evening, the vans were returned to the property, where they were stored in buildings. The zoning regulation in question called for home businesses to be carried on only by persons residing in the household. The court ruled in favor of the property owner, finding the zoning code requiring the home occupation business be carried on by a resident family member did not require that every person associated with the home occupation be a resident family member. *Id.* at *2.

**{¶21}** In the instant case, as in *Traub,* the non-resident employees do not work on the site, but merely leave their personal vehicles there during the work day while taking the company vehicles to the jobsites. The only evidence of business activity which occurred at the residence was bookkeeping, telephone calls, and billing, and such activity was conducted solely by Joseph or Sherri Davide. We find the trial court did not abuse its discretion in finding the home occupation was conducted only by persons residing in the dwelling unit.

**{¶22}** Appellants argue the Davides were displaying stock in trade on the premises. Evidence was presented concerning the storage of aggregate materials on the property. While some of this material was used for the business, some was for personal use, and some was used to assist neighbors in their personal projects at their homes. However, the Davides testified they would not store aggregate on their property any longer, thus there was evidence there will be no future display of stock in trade on the property. Again, we find the trial court did not abuse its discretion in concluding there would be no display of stock in trade on the property.

**{¶23}** Finally, Appellants argue the home occupation creates a nuisance due to the noise from the three vehicles going up and down the driveway twice a day. The evidence reflected it takes approximately two to five minutes to travel the length of the driveway. Appellants testified regarding the disturbance caused by the noise, as did their cousin who did not live on the property but had stayed on the property while visiting. However, other neighbors testified the trucks did not create a disturbance. "It is evident that, what amount of annoyance or inconvenience will constitute a legal injury, resulting in actual damage, being a question of degree, dependent on varying circumstances, can

not be precisely defined, and must be left to the good sense and sound discretion of the tribunal called upon to act." *Columbus Gaslight & Coke Co. v. Freeland*, 12 Ohio St. 392, 399 (1861). Based on the conflicting evidence before the BZA on the issue, we find the trial court did not abuse its discretion in concluding the trucks did not create a nuisance by reason of noise.

**{¶24}** The first assignment of error is overruled.

II.

**{¶25}** In their second assignment of error, Appellants argue the court erred in affirming the decision of BZA granting the Davides variances for their accessory buildings. They argue the Davides did not establish a practical difficulty to warrant the variances, and the "massive accessory buildings" change the essential character of the neighborhood.

**{¶26}** The Ohio Supreme Court has set forth a list of factors to consider in determining whether a variance is warranted by practical difficulties:

> While existing definitions of "practical difficulties" are often nebulous, it can safely be said that a property owner encounters "practical difficulties" whenever an area zoning requirement (e.g., frontage, setback, height) unreasonably deprives him of a permitted use of his property. The key to this standard is whether the area zoning requirement, as applied to the property owner in question, is reasonable. The practical difficulties standard differs from the unnecessary hardship standard normally applied in use variance cases, because no single factor controls in a determination of

practical difficulties. A property owner is not denied the opportunity to establish practical difficulties, for example, simply because he purchased the property with knowledge of the zoning restrictions. *Kisil*, *supra*, 12 Ohio St.3d at 33, 465 N.E.2d 848; cf. *Consolidated Mgmt., Inc. v. Cleveland* (1983), 6 Ohio St.3d 238, 452 N.E.2d 1287.

The factors to be considered and weighed in determining whether a property owner seeking an area variance has encountered practical difficulties in the use of his property include, but are not limited to: (1) whether the property in question will yield a reasonable return or whether there can be any beneficial use of the property without the variance; (2) whether the variance is substantial; (3) whether the essential character of the neighborhood would be substantially altered or whether adjoining properties would suffer a substantial detriment as a result of the variance; (4) whether the variance would adversely affect the delivery of governmental services (e.g., water, sewer, garbage); (5) whether the property owner purchased the property with knowledge of the zoning restriction; (6) whether the property owner's predicament feasibly can be obviated through some method other than a variance; (7) whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting the variance. See, generally, 3 Anderson, American Law of Zoning (2 Ed.1977), Variances, Section 18.47 et seq.; *Wachsberger v. Michalis* (1959), 19 Misc.2d 909, 191 N.Y.S.2d 621.

*Duncan v. Village of Middlefield*, 23 Ohio St.3d 83, 86, 491 N.E.2d 692, 695–96 (1986).

**{¶27}** The list of factors set forth in *Duncan* is not exhaustive, and no single factor is controlling. *Boice v. Ottawa Hills,* 137 Ohio St. 3d 412, 999 N.E.2d 649, 2013-Ohio-4769, ¶15.

**{¶28}** The BZA heard evidence the buildings were set back from the road and obscured by a line of trees. They had been in place for many years without complaint. There was no suggestion the variances would interfere with any governmental services. To deny the variance would require the Davides to tear down the buildings, store their personal belongings in the open, and rent space to store their commercial vehicles elsewhere. The Davides testified they were unaware permits were required for their accessory buildings. However, even assuming restrictions were in place and the Davides should have been aware of the restrictions before adding on to the buildings, a property owner is not denied the opportunity to establish practical difficulties simply because he purchased the property with knowledge of the zoning restrictions. *Duncan, supra,* at 86.

**{¶29}** Based upon the foregoing, we find the court did not abuse its discretion in finding the decision of the BZA to grant the variances was supported by sufficient evidence of practical difficulties.

**{¶30}** The second assignment of error is overruled.

Cross-Assignment

**{¶31}** The cross-assignment of error is rendered moot by our disposition of Appellants' first and second assignments of error.

**{¶32}** The judgment of the Stark County Common Pleas Court is affirmed.

By: Hoffman, J.

Wise, John, P.J. and

Gwin, J. concur