[Cite as *Superior 24HR Towing & Rd. Serv., L.L.C. v. Springfield Twp.*, 2010-Ohio-5895.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Superior 24HR Towing & Road Service, LLC	Court of Appeals No. L-10-1049 L-10-1050
Appellant	Trial Court No. CI0200702546 CI0200808467
v.	
Springfield Township, et al.	**DECISION AND JUDGMENT**
Appellee	Decided: December 3, 2010

* * * * *

Richard R. Malone, for appellant.

Julia R. Bates, Lucas County Prosecuting Attorney, and
John A. Borell, Assistant Prosecuting Attorney, and
Karlene D. Henderson, Assistant Prosecuting Attorney, for
appellee, Swanton Township Board of Trustees.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} We consider two consolidated administrative appeals from judgments of the Lucas County Court of Common Pleas. Both appeals concern zoning decisions of appellee, Springfield Township Board of Trustees ("Township Board of Trustees"), with respect to the permitted use of property located at 1331 Albon Road, Springfield Township, Lucas County, Ohio. Appellant, Superior 24HR Towing and Road Service, LLC ("Superior") is the owner of the Albon Road property.

{¶ 2} In 1988, the prior owners of the property secured a special use permit from Springfield Township authorizing use of the property for outside storage of police towed vehicles. Subsequently appellant acquired the property.

{¶ 3} In 2006, appellant applied for a special use permit to expand its use of the property. The Township Board of Trustees denied the application on February 20, 2007. Superior appealed the decision to the Lucas County Court of Common Pleas.

{¶ 4} On November 5, 2008, while the first appeal remained pending, the Township Board of Trustees determined that Superior had violated the 1988 special use permit and revoked the permit. Superior also appealed that decision to the Lucas County Court of Common Pleas.

{¶ 5} On January 26, 2010, the Lucas County Court of Common Pleas issued a judgment affirming the Township Board of Trustees' revocation of the 1988 special use permit. In a separate judgment on the same date, the court dismissed the administrative

appeal of the decision denying the 2006 application for a special use permit as moot. Superior has appealed both judgments to this court. We have consolidated the appeals for proceedings in this court.

{¶ 6} Superior asserts three assignments of error on appeal:

{¶ 7} "Assignment of Error No. 1

{¶ 8} "The trial court committed an error in its determination that the prohibition of outdoor parking of 'Commercial Vehicles' as set forth in Sec. 2401.10 of the Springfield Township Zoning Resolution operates to prohibit the outdoor parking of "Commercial Vehicles" in the industrial zoned districts in the Township.

{¶ 9} "Assignment of Error No. 2

{¶ 10} "The trial court committed an error when it determined that the Township Trustees did not abuse their discretion when the Trustees revoked Superior's Special Use Permit without regard to the undisputed evidence that the parking of Superior's vehicles on its property had been discontinued prior to the hearing before the Trustees, and when the Trustees considered and relied on unsubstantiated and untested allegations concerning non-parking related issues pertaining to Superior's use of its Property which were not within the scope of the Notice of Violation.

{¶ 11} "Assignment of Error No. 3

{¶ 12} "The trial court committed error when it failed to conduct an evidentiary hearing to determine if the Township's interpretation of Sec. 2401.10 of the Zoning

Resolution to prohibit the outside parking of Commercial Vehicles in any area of the Township was consistent with the manner in which such vehicles were actually parked in the Township, and whether the Township acted arbitrarily by selectively enforcing the alleged prohibition against the outside parking of Commercial Vehicles in the Township against the Appellant, as the Appellant was not afforded any opportunity to present the evidence proffered to the trial court at the administrative hearing which was conducted before the Township Trustees."

{¶ 13} R.C. 2506.04 governs appellate review in R.C. Chapter 2506 administrative appeals. It provides:

{¶ 14} "If an appeal is taken in relation to a final order, adjudication, or decision covered by division (A) of section 2506.01 of the Revised Code, 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 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 *Henley v. Youngstown Bd. of Zoning Appeals* (2000), 90 Ohio St.3d 142, 147, the Ohio Supreme Court construed R.C. 2506.04 and distinguished the functions of common pleas courts and courts of appeal in R.C. Chapter 2506 administrative appeals:

{¶ 16} "A. The Limited Standard of Appellate Review in an R.C. 2506.04 Appeal

{¶ 17} "Construing the language of R.C. 2506.04, we 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, 223, citing *Dudukovich v. Lorain Metro. Hous. Auth.* (1979), 58 Ohio St.2d 202, 206-207, 12 O.O.3d 198, 201-202, 389 N.E.2d 1113, 1116-1117.

{¶ 18} "The standard of review to be applied by the court of appeals in an R.C. 2506.04 appeal is '*more limited* in scope.' (Emphasis added.) *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34, 12 OBR 26, 30, 465 N.E.2d 848, 852. '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 fn. 4. 'It is incumbent on the trial court to examine the evidence. Such is not the charge of the appellate court. * * * The fact that the court of appeals, or this court, might have arrived at a different conclusion than the administrative agency is immaterial. Appellate courts must not substitute their judgment for those of an administrative agency or a trial court absent the approved criteria for doing so.' *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 261, 533 N.E.2d 264, 267."

{¶ 19} Accordingly, this court has recognized that "an appellate court is required to affirm the common pleas court 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. *Kisil*, supra, at 34. In making such a finding, this court applies an abuse of discretion standard. *Nichols v. Hinckley Twp. Bd. of Zoning Appeals* (2001), 145 Ohio App.3d 417, 421." *Eckel v. Swanton Twp. Bd. of Trustees*, 6th Dist. No. L-03-1289, 2004-Ohio-4855, ¶ 10.

{¶ 20} The Albon Road property is zoned "M-1 Limited Industrial District." The Springfield Zoning Resolution lists permitted uses for M-1 property (Zoning Resolution Section 15, subsection 1501) and also identifies "conditional uses" which "may be approved" (Zoning Resolution Section 15, subsection 1502).[1] Under the zoning resolution, approval is required to use M-1 property for "[a]ny permitted use requiring

[1]Subsection 1502 conditional uses were referred to as "special uses" in the prior version of the zoning resolution.

outside storage" or for use as a "[s]torage lot including automobiles, boats, trucks, and recreational vehicles."

{¶ 21} Springfield Township issued a special use permit for the property in 1988 authorizing use of the property for outside storage of police towed vehicles. In February 2007, the Township Board of Trustees denied Superior's application to construct an additional building, to expand the storage lot, and to authorize an additional use of the property for an automotive repair shop and storage yard.

{¶ 22} On October 7, 2008, the board issued a notice to appellant that the zoning inspector's office had determined that the 1331 Albon Road property was being put to uses contrary to the terms of the 1988 permit in that the premises were being used "for auto, other vehicles, and equipment storage, not ordered to the site by police as a 'police tow.'" The notice also provided that the zoning inspector would seek revocation of the 1988 use permit at a board hearing scheduled for October 20, 2008, upon proof that a violation of the 1988 special use permit had occurred.

{¶ 23} The hearing proceeded on November 5, 2008. The township zoning inspector testified at the hearing that he had investigated the use put to the 1331 Albon Road property during the period from July 2, 2008, through October 28, 2008. He testified that Superior Towing had used the site during the period on a continuing basis for outside storage of semi tractor-trailer trucks, dump trucks, and other vehicles for purposes unrelated to appellant's police tow storage business.

{¶ 24} Appellant has not disputed that it used the Albon Road property for outside storage of commercial trucks and equipment including semi tractor-trailers on a continuing basis during July through October 2008. Appellant admits to such use and asserts that the vehicles and equipment were owned by it and that the parking of the semis, trucks and other vehicles on the premises did not violate the zoning resolution. It denies any contention that it operated a commercial trucking business on the property as there is no evidence that it transported loads to the property and transferred loads between vehicles there for further transport.

{¶ 25} Under Assignment of Error No. 1, Superior argues that the court below erred in its interpretation of the Springfield Zoning Resolution. It argues that Section 24 of the zoning resolution sets forth the parking requirements for all areas in Springfield Township and that subsection 2401.10[2] of the zoning resolution is the only provision that regulates parking of commercial vehicles in the township. Superior argues that Section 2401.10 limits truck parking of vehicles owned by the property owner only in agricultural, residential or commercial districts and that the restrictions do not apply to the Albon Road property because it is located in an M-1 limited industrial district.

{¶ 26} Appellee Township Board of Trustees argues that the property is located in an M-1 light industrial district and that the township zoning resolution lists under

[2]We refer to the parking provisions of the zoning resolution as subsection 2401.10 in this Decision and Judgment even though the provision has been renumbered.

subsection 1501 "permitted uses" for which prior township approval is not required and under subsection 1502 "conditional uses" for which approval is required. The board argues that under subsection 1502, a special use permit is required for "any permitted use requiring outdoor storage," or a "storage lot including automobiles, boats, trucks, and recreational vehicles." Although appellant held a 1988 permit for the site, it limited outside storage to police tow vehicles.

{¶ 27} Appellee argues further that the court of common pleas correctly interpreted subsection 2401.10 of the zoning resolution to apply to M-1 property and to prohibit appellant from parking the semis, trucks and other vehicles outside at the 1331 Albon Road property during the period from July through October 2008.

{¶ 28} Subsection 2401.10 of the zoning resolution that was in effect during the period provided:

{¶ 29} "2401.10 Parking of Commercial Vehicles

{¶ 30} "Trucks, tractors/cabs and /or truck trailers [1] shall not be parked outdoors [2] except when used in conjunction with agricultural activities in any agricultural, residential or commercial district, [3] except while making deliveries." (Bracketed material added.)

{¶ 31} The court of common pleas rejected appellant's contention that the restrictions against parking of commercial vehicles under subsection 2401.10 do not apply to M-1 districts. It reasoned:

{¶ 32} "The Court disagrees with this contention. The first phrase of paragraph 2401.10 clearly, plainly, and unambiguously expresses a general rule that all trucks 'shall not be parked outdoors * * *.' (Emphasis added.) The second phrase, also clearly and plainly, expresses a two-part exception to the general rule – (a.) trucks 'used in conjunction with agricultural activities' may be parked outdoors within (b.) 'any agricultural, residential or commercial district * * *.' (Emphasis added.) And, the third phrase, somewhat un-artfully, permits the short-term parking of trucks 'while making deliveries.' (Emphasis added.) Even if the third phrase is somewhat ambiguous, the Court finds this potential ambiguity does not implicate the clear intent expressed in the first and second phrases. When, as here, the relevant language and the meaning of a statute or rule is clear and unambiguous, a court is to apply the clear meaning. See *State v. Coburn*, 121 Ohio St.3d 310, 2009-Ohio-834, ¶ 8 * * *." (Emphasis added by trial court. Footnote omitted.)

{¶ 33} Appellant argues that the absence of any reference to M-1 zoning districts in subsection 2401.10 leads to an interpretation that its prohibition against parking trucks outdoors does not apply to M-1 district properties.

{¶ 34} We agree with the trial court in its construction of these provisions of the Springfield Zoning Resolution. In our view, the interpretation argued by appellant that outdoor parking is permitted in M-1 districts under subsection 2401.10 would conflict with the unambiguous requirement under subsection 1502 that a special use permit is

required in M-1 districts for any "permitted use requiring outdoor storage" or for a "storage lot including automobiles, boats, trucks, and recreational vehicles."

{¶ 35} The Ohio Supreme Court has recognized that "'it is a fundamental rule of statutory construction that statutes relating to the same subject matter should be construed together' and '[i]n construing such statutes in pari materia, they should be harmonized so as to give full application to the statutes.' *State ex. rel. Thurn v. Cuyahoga Cty. Bd. of Elections* (1995), 72 Ohio St.3d 289, 294, 649 N.E.2d 1205." *State ex rel. Commt. for the Proposed Ordinance to Repeal Ordinance No. 146-02, W. End Blight Designation v. Lakewood*, 100 Ohio St.3d 252, 2003-Ohio-5771, ¶ 20.

{¶ 36} In our view, the court of common pleas' construction of subsection 2401.10 as imposing parking restrictions within M-1 districts avoids conflict with and gives effect to the permit provisions under subsection 1502 in M-1 districts with respect to "any permitted use requiring outdoor storage" or a "storage lot including automobiles, boats, trucks, and recreational vehicles." The construction gives effect to the over all regulatory scheme for M-1 districts as requiring approval for certain specified "conditional uses," including "any permitted use requiring outdoor storage" or a "storage lot including automobiles, boats, trucks, and recreational vehicles." Accordingly, we conclude that the court of common pleas did not err in construing that parking prohibitions under subsection 2401.10 apply to M-1 district property. Appellant's Assignment of Error No. 1 is not well-taken.

{¶ 37} Under Assignment of Error No. 3, Superior claims that the trial court erred in failing to conduct an evidentiary hearing on the appeal. Under Assignment of Error No. 2, Superior asserts that the court erred in ruling that the Township Board of Trustees did not abuse its discretion in revoking the 1988 permit. We consider claimed error based upon a failure to conduct an evidentiary hearing on appeal first.

{¶ 38} The right to a hearing on administrative appeals brought under R.C. Chapter 2506 is limited by R.C. 2506.03. *Dvorak v. Mun. Civ. Serv. Comm. of Athens* (1976), 46 Ohio St.2d 99, paragraph one of syllabus. In *Dvorak v. Mun. Civ. Serv. Comm. of Athens*, the Ohio Supreme Court held that hearings in such appeals are limited to "the transcript of the administrative body, unless one of the conditions specified in R.C. 2506.03 appears on the face of the transcript or by affidavit." Id.

{¶ 39} R.C. 2506.03(A)(1)-(5) provides:

{¶ 40} "(A) The hearing of an appeal taken in relation to a final order, adjudication, or decision covered by division (A) of section 2506.01 of the Revised Code shall proceed as in the trial of a civil action, but the court shall be confined to the transcript filed under section 2506.02 of the Revised Code unless it appears, on the face of that transcript or by affidavit filed by the appellant, that one of the following applies:

{¶ 41} "(1) The transcript does not contain a report of all evidence admitted or proffered by the appellant.

{¶ 42} "(2) The appellant was not permitted to appear and be heard in person, or by the appellant's attorney, in opposition to the final order, adjudication, or decision, and to do any of the following:

{¶ 43} "(a) Present the appellant's position, arguments, and contentions;

{¶ 44} "(b) Offer and examine witnesses and present evidence in support;

{¶ 45} "(c) Cross-examine witnesses purporting to refute the appellant's position, arguments, and contentions;

{¶ 46} "(d) Offer evidence to refute evidence and testimony offered in opposition to the appellant's position, arguments, and contentions;

{¶ 47} "(e) Proffer any such evidence into the record, if the admission of it is denied by the officer or body appealed from.

{¶ 48} "(3) The testimony adduced was not given under oath.

{¶ 49} "(4) The appellant was unable to present evidence by reason of a lack of the power of subpoena by the officer or body appealed from, or the refusal, after request, of that officer or body to afford the appellant opportunity to use the power of subpoena when possessed by the officer or body.

{¶ 50} "(5) The officer or body failed to file with the transcript conclusions of fact supporting the final order, adjudication, or decision."

{¶ 51} Appellant did not file in common pleas court any affidavit under R.C. 2506.03 asserting the existence of any of the deficiencies listed in R.C. 2506.03(A)(1)-(5)

with respect to administrative proceedings that resulted in revocation of the 1988 special use permit. The record does not include any request by appellant for an evidentiary hearing on appeal in common pleas court. To the extent appellant offered new evidence on appeal, it was considered, without objection, by the court.[3]

{¶ 52} Appellant argues that the court of common pleas erred because it "never afforded Superior an opportunity to explore and prove its assertion that the Township's enforcement actions were selective and directed solely at Superior, or that its failure to pursue enforcement against others was evidence that there was no prohibition in the first place." Such a hearing, however, is not scheduled as a matter of right in a R.C. Chapter 2506 appeal. It requires a showing of deficiencies listed in R.C. 2506.03(A)(1)-(5) in procedure or evidence at the administrative hearing. *Price v. Margaretta Twp. Bd. of Zoning Appeals*, 6th Dist. No. E-04-023, 2005-Ohio-1778, ¶ 17-30; *Gibraltar Mausoleum Corp. v. Toledo* (1995), 106 Ohio App.3d 80, 84. Where such a showing is made, "the common pleas court is directed to hear the appeal 'upon the transcript and such additional evidence as may be introduced by any party.' R.C. 2506.03." *Gibraltar Mausoleum Corp. v. Toledo* at 84.

{¶ 53} As the common pleas court considered all evidence introduced by appellant on appeal of claimed selective enforcement of parking restrictions in M-1 districts and

[3]Exhibit 6 to appellant's June 22, 2009 appellate brief in common pleas court included a series of photographs depicting various trucks, including semi tractor-trailer trucks, parked at various locations in the township and identified in the exhibit by zoning district and address.

appellant made no application under R.C. 2506.03(A)(1)-(5) for a hearing or opportunity to introduce other evidence based upon any claimed R.C. 2506.03(A)(1)-(5) deficiency at the administrative hearing, we find appellant's Assignment of Error No. 3 is not well-taken.

{¶ 54} Under Assignment of Error No. 2, appellant argues that the Court of Common Pleas erred when it determined that the Township Board of Trustees did not abuse its discretion when it revoked the 1988 special use permit. Subsection 2605 of the Springfield Township zoning ordinance authorizes revocation of a special use permit either upon its expiration or for "violation of any condition of approval." The 1988 permit limited outdoor storage to storage of police-towed vehicles.

{¶ 55} Superior argues that the revocation of the permit was pretextual because it had discontinued storing the offending trucks at the property before the hearing and had agreed to refrain parking the vehicles on the property pending a determination of the legality of such use. Secondly, Superior contends that the court of common pleas erred in relying on testimony at the administrative hearing of poor drainage and flooding of neighboring property in determining whether the Township Board of Trustees abused its discretion in revoking the permit. Finally, Superior claims that consideration of drainage and flooding issues was not within the scope of the notice for the administrative hearing.

{¶ 56} In response, Township Board of Trustees contends that the court of common pleas upheld the decision to revoke the special use permit based upon reliable,

probative and substantial evidence in the record. It also argues that consideration of how Superior's use of the property affected neighboring properties and their use was appropriate in deciding whether to revoke the permit. The Township Board of Trustees argues that such factors are identified in subsection 2601 of the zoning resolution as factors to be considered in determining whether to grant a special use permit and therefore are appropriately considered when addressing whether revocation of a permit is appropriate where a violation of a special use permit has been established.

{¶ 57} Subsection 2601 factors include:

{¶ 58} "A. The proposal will be in accordance with the general objectives, or with any specific objectives of the Springfield Township Master Plan;

{¶ 59} "B. *The proposal is harmonious with the existing or intended character of the general vicinity of the lot and will not change the essential character of the area;*

{¶ 60} "C. *The proposal will not be hazardous or disturbing to existing or future neighboring uses*;

{¶ 61} "D. The proposal will be served adequately by essential public facilities and services;

{¶ 62} "E. The proposal will not involve uses, activities, processes, materials, equipment, and conditions of operation that will be detrimental to any persons, property or general welfare by reason of excessive production of traffic, noise, smoke, fumes, glare, vibration or odors." (Emphasis added.)

{¶ 63} We agree that consideration of how Superior's use of its property affected neighboring properties and their use was appropriate under the zoning resolution upon proof of a violation and in determining the appropriate action to be taken by the Township Board of Trustees in response. We find no basis to claim unfair surprise in the board's consideration of the issue at the hearing.

{¶ 64} The court of common pleas concluded that there was evidence in the record to conclude that Superior had been warned against parking semi trucks on the property during proceedings on the 2006 permit application and that Superior's actions demonstrated that it "consciously disregarded the prohibition of Semi truck parking."

{¶ 65} Neighboring property owners testified to an increase in flooding of neighboring properties after Superior purchased the Albon Road property. According to the testimony, Superior had increased the paved and graveled area on the property causing increased runoff. The common pleas court concluded that the evidence demonstrated that Superior could have remedied drainage problems without the need for a permit but failed to do so.

{¶ 66} The common pleas court concluded that the Township Board of Trustees "was uncertain that Superior was trustworthy" and that as a "preventive measure" the Township Board of Trustees decided the appropriate response to the violation was to revoke the permit.

{¶ 67} The common pleas court directly considered and rejected appellant's argument that the grounds for revocation of the special use permit were pretextual and a result of selective enforcement of township parking regulations against appellant. It reviewed photographs submitted in evidence by appellant of other properties depicting large trucks parked on other properties in Springfield Township. The court noted, however, that appellant failed to present evidence of whether the other property owners lacked special use permits allowing parking of the vehicles or were otherwise in violation of the township zoning resolution. The court also noted the discretion afforded the township "to place conditions on a property owner who seeks to maintain a special use following a demonstrated violation."

{¶ 68} The common pleas court concluded that the November 5, 2008 decision of the Township Board of Trustees to revoke the permit was supported by a preponderance of substantial, reliable and probative evidence in the record and affirmed the decision on appeal. We find no abuse of discretion by the court of common pleas in its conclusions or judgment. They are supported by competent, credible evidence in the record.

{¶ 69} We conclude that appellant's Assignment of Error No. 2 is not well-taken.

{¶ 70} Appellant has argued no error on any independent ground with respect to the court of common pleas' judgment affirming the Township Board of Trustees' decision of February 20, 2007, that denied appellant's 2006 application for a special use permit. Accordingly, we conclude that justice has been afforded the party complaining and affirm

both January 26, 2010 judgments of the Lucas County Court of Common Pleas in these consolidated appeals. We order appellant to pay costs of both these appeals pursuant to App.R. 24.

JUDGMENTS AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Keila D. Cosme, J.
CONCUR. _____
JUDGE