

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

Bloom Township Board of Trustees,
Wood County, Ohio

Appellee

Court of Appeals No. WD-10-065

Trial Court No. 2009 CV 0804

v.

Bates Recycling, Inc., et al.

Appellants

DECISION AND JUDGMENT

Decided: April 29, 2011

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
Mary Loeffler Mack, Assistant Prosecuting Attorney, for appellee.

John C. Filkins, for appellants.

* * * * *

SINGER, J.

{¶1} This is an appeal from a judgment of the Wood County Court of Common Pleas wherein the court granted summary judgment to appellee, the Bloom Township Board of Trustees on a complaint against appellants for failure to comply with the Bloom

Township Zoning Resolution, conditional use permit and variance. For the reasons that follow, we affirm.

{¶2} On October 15, 2007, appellants, Joseph C. Bates and J. Christopher Bates, filed an application under the name "Bates Recycling, Inc." for a conditional use permit and a variance with the Board of Zoning Appeals ("BZA") in order to operate a recycling center at 12729 Jerry City Road. The property is zoned for industrial use.

{¶3} The Bloom Township Zoning Resolution sets forth the permitted uses in the Industrial District. It allows:

{¶4} "[A]ny industrial use provided that no noxious or offensive activity shall be carried on within this district, nor shall anything be done which is injurious, dangerous or offensive to the neighborhood by reason of excessive emission of odor, dust, smoke, gas, noise, fumes, flame, radiation or vibration.

{¶5} "No residential construction shall be permitted."

{¶6} Article XVIII. (C) of the resolution specifically permits recycling centers on industrial zoned property as a conditional use. The article further states that: [T]he Zoning Board of Appeals may impose additional safeguards or limitations as deemed appropriate."

{¶7} On December 21, 2007, the BZA approved appellants' application for a conditional use permit adding that the variance application would be reviewed at a later

time. A hearing was held on February 6, 2008. Appellants' variance request was granted as follows:

{¶8} "[F]ront Yard: There shall be a front yard setback of fifty (50) feet and evergreen screening shall be installed on a line ten (10) feet behind said fifty (50) foot setback. In addition, the hill, which presently exists at the front of the property, shall not be moved any further north of its present location. Bates Recycling, Inc., shall prepare a diagram with measurements from five different locations from the property line to establish the present location of the hill. This diagram shall be signed by Devin Baker and Joe Bates of Bates Recycling, Inc., and then filed with the Bloom Township records related to this variance.

{¶9} "A Twenty (20) foot driveway, located along the properties [sic] west boundary, running north and south, shall be permitted and the evergreen screening shall commence within ten (10) feet of the edge of said driveway. No fencing shall be required in addition to this evergreen screening. Three (3) foot tall plantings are to be used to create a sufficient visual barrier consisting of evergreen, which are not Arborvitaes.

{¶10} " * * *

{¶11} "On the 1.777 acre parcel to the rear of the recycling center, there shall be a twenty five (25) foot rear yard and side setback. If the trees are removed within the

setback, then a visual barrier of evergreens will be planted, and maintained within the planting requirement already identified."

{¶12} On August 10, 2009, appellee filed a complaint against appellants arguing that they failed to comply with the Bloom Township Zoning Resolution, the terms of the conditional use permit and the variance. On August 9, 2010, appellee filed a motion for summary judgment. The motion was granted on September 23, 2010. The court further issued a permanent injunction against appellants prohibiting them from operating any recycling center on the Jerry Road property until they complied with the conditional use permit and variance. Appellants now appeal setting forth the following assignment of error:

{¶13} "The trial court erred by granting appellees' motion for summary judgment for issues of material fact existed which precluded the granting of summary judgment."

{¶14} On review, appellate courts employ the same standard for summary judgment as trial courts. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. The motion may be granted only when it is demonstrated: " * * * (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly

in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66; Civ.R. 56(C).

{¶15} Civil actions for violation of township zoning ordinances can be maintained under R.C. 519.24. "R.C. 519.24 expressly states that 'in addition to any other remedies,' a board of township trustees may institute a civil action against a person who violates a township zoning regulation." *State v. McNulty* (1996), 111 Ohio App.3d 828, 832. Civil actions for injunctive relief may also be brought under R.C. 519.24.

{¶16} In its motion for summary judgment, appellee argued that there was no genuine issue of material fact regarding appellants' failure to comply with Bloom Township's zoning resolution and the terms of their conditional use permit and variance. Specifically, appellants are residing on the property in question, the evergreen screening has neither been planted nor installed on the property, and appellants have not filed a diagram establishing the position of the hill at the front of the property between the property and the property owned by Devin Baker, signed by Baker and appellants. In support, appellee submitted appellant Joseph Bates' answers to appellee's interrogatories wherein he admits that he resides on the property and he admits that he has not complied with the evergreen screening requirements or filed the requested diagram.

{¶17} In its response to appellee's motion for summary judgment, appellants did not dispute that they were not in compliance with the zoning resolution and the terms of their conditional use permit and variance. Rather, appellants offered excuses as to why

they were not in compliance. As to the residential construction issue, appellants argued that a residential structure already existed on the property when they acquired it, therefore, they cannot be held responsible for its construction. They argued that they have been unable to plant the evergreen screening because of an unanticipated evacuation and depositing of gas lines by the gas company in the area where the evergreen screening was to be planted. Finally, they argued that they have not submitted the required diagram because Devin Baker refuses to sign it.

{¶18} Given that appellants do not dispute the fact that they have not complied with the zoning resolution and the terms of their conditional use permit and variance, for whatever their reasons, we cannot say that the court erred in granting summary judgment to appellee. Accordingly, appellants' assignment of error is found not well-taken.

{¶19} On consideration whereof, the judgment of the Wood County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellants pursuant to App.R. 24.

JUDGMENT AFFIRMED.

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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

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.
